

7^{ème} commission

Are there Limits to the Dynamic Interpretation of the Constitution and Statutes of International Organizations by the Internal Organs of such Organizations (with Particular Reference to the UN System)?

Y a-t-il des limites à l'interprétation dynamique de la Constitution ou du statut des organisations internationales par les organes de celles-ci, avec une référence particulière au système des Nations Unies ?

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Résumé (traduction)

Les organisations internationales sont instituées par traité multilatéral, dotées d'une personnalité juridique propre et distincte de celles de leurs Etats membres et chargées de certains objectifs et fonctions. Si les actes constitutifs des organisations internationales renferment, du fait de leur nature de traités multilatéraux, des dispositions en matière d'amendement, ces dernières sont souvent complexes et prévoient des limitations procédurales à l'adoption et à l'entrée en vigueur desdits amendements. Les actes constitutifs des organisations internationales se prêtent tout aussi difficilement à la modification par voie d'accord ultérieur ou à la substitution par un traité entièrement nouveau. En principe, ces instruments sont rédigés en des termes généraux, lesquels laissent une latitude à l'interprétation et à l'adaptation aux contextes changeants, de sorte qu'ils font l'objet d'un processus continu d'interprétation dont certains aspects constituent des modifications *de facto* ou informelles.

Les rédacteurs des actes constitutifs des organisations internationales ont fait le choix délibéré d'autoriser ces dernières à interpréter leurs propres actes constitutifs. Après avoir considéré, lors de la conférence de San Francisco, un nombre de solutions *ad hoc* auxquelles les Etats pouvaient avoir recours pour résoudre leurs différends interprétatifs, les mentions relatives à l'interprétation autoritaire furent délibérément omises du texte de la Charte des Nations Unies. Dans le cas des Nations Unies, et d'autres organisations spécialisées, il a également été décidé, de manière délibérée, de ne confier à aucun organe de ces organisations internationales la compétence exclusive en matière d'interprétation autoritaire de l'acte constitutif du système. En conséquence de quoi, les organisations internationales interprètent leurs actes constitutifs dans le cadre de leur travail quotidien, à la lumière d'un flux continu de considérations juridiques et factuelles nouvelles.

Le fait pour les organisations internationales de détenir la compétence en matière d'interprétation autoritaire de leurs actes constitutifs propres a permis le développement, au sein de chaque organisation, d'une jurisprudence « constitutionnelle » large et permissive, seulement soumise à un contrôle occasionnel – et à titre purement consultatif. De plus, ce contrôle ne peut être exercé qu'avec le consentement et à la demande de l'organisation internationale concernée. Cela a eu pour effet d'offrir une certaine flexibilité aux Etats membres lorsqu'il existe un

consensus en vue de donner une interprétation large à leurs actes constitutifs sans devoir subir les délais inhérents aux procédures formelles d'amendement. Le fait pour les organisations internationales de détenir la compétence interprétative eu égard à leurs actes constitutifs a un autre effet notable, celui de l'absence de condition d'unanimité. Certains Etats membres de l'organisation internationale peuvent ne pas s'accorder avec une interprétation particulière mais leur désaccord ne compromettra pas le caractère autoritaire de l'interprétation. Une interprétation qui est *généralement acceptée* par les membres de l'organisation internationale est autoritaire.

La pratique des différents organes des Nations Unies et des agences spécialisées est également devenue une source sur laquelle s'appuyer lors d'interprétations ultérieures. Même les conseils sur l'interprétation à donner à la Charte émis par le passé par le Secrétariat des Nations Unies semblent avoir suivi cette même tendance, celle d'accorder une importance particulière à la pratique antérieure de l'organisation à laquelle les Etats membres ont consenti.

Ce qui se présente, rétrospectivement, comme un mouvement inexorable en faveur de l'interprétation par les organisations internationales de leurs actes constitutifs a poussé plusieurs auteurs à qualifier ladite interprétation d'unique, laquelle interprétation, du fait de sa spécificité, « justifi[e] un cadre interprétatif propre », qui dépasse celui de la Convention de Vienne sur le droit des traités.

Si les rédacteurs de la Convention de Vienne souhaitaient codifier les règles interprétatives applicables à tous les traités, ils étaient conscients de la nature spéciale des traités que sont les actes constitutifs des organisations internationales. Au lieu de proposer une modification du droit général prévu aux articles pertinents, les rédacteurs ont préféré reconnaître une *lex specialis* applicable aux actes constitutifs des organisations internationales et qui englobe toutes les règles pertinentes et la pratique établie de l'organisation concernée.

Le caractère ambigu de la confirmation par la Cour internationale de Justice de l'existence de pouvoirs implicites découle peut-être de la décision prise à San Francisco de ne prévoir aucun interprète autorisé pour le système de la Charte. Dans le cas où, comme dans le système de la Charte, « il n'existe pas d'indications précises relatives à l'identité de l'organe qui peut interpréter l'acte ou l'ensemble des principes ou des règles, il est souvent nécessaire, en pratique, d'admettre le fait que plusieurs organes de l'organisation internationale viendront à les interpréter et que dans la plupart des cas, ces interprétations seront en général acceptées. »

En cas d'interprétation de la Charte, les organisations internationales ont invoqué et se sont appuyées sur d'autres conventions internationales. L'Assemblée générale s'est fondée sur sa propre Déclaration universelle des droits de l'homme lors de l'interprétation et de l'élaboration du concept et du contenu du principe d'autodétermination prévu à l'article 1(2) de la Charte et, à ce titre, lors de la détermination de la responsabilité des Nations Unies dans le cadre des articles 55, 73 et 76 de la Charte. De même, le Conseil de sécurité s'est appuyé sur l'obligation de protection des civils en vue d'élargir la portée de la notion de « menace contre la paix, d'une rupture de la paix ou d'un acte d'agression » prévue à l'article 39 de la Charte, et celle des mesures que le Conseil peut prendre en vertu de son article 41. Des questions relatives aux droits de l'homme en lien avec les procédures de radiation des listes dans le cadre de sanctions ciblées ont amené le Secrétaire général des Nations Unies, le Haut-Commissaire des Nations Unies aux droits de l'homme et plusieurs Etats siégeant au Conseil de sécurité à adopter des résolutions supplémentaires en vue de remédier aux insuffisances de la résolution 1267 de 1999. Dans le contexte de la Banque mondiale, des considérations relatives aux droits de l'homme et à la protection de l'environnement ainsi qu'à la bonne gouvernance et la lutte anti-corruption ont été utilisées lors de l'interprétation de ses Statuts. Ainsi, les organisations internationales se sont appuyées sur certaines conventions internationales lorsqu'elles étaient compatibles avec les politiques qu'elles souhaitent promouvoir ou les mesures qu'elles souhaitent prendre.

L'analyse présentée dans ce rapport démontre que, bien que certaines interprétations par les organisations internationales de leurs actes constitutifs donnent lieu à un amendement *de facto* de ces derniers, le niveau de contrôle ou de limitation posée à ces interprétations est dans la pratique non-existant ou sans effet. De plus, même lorsqu'une telle réglementation existe, comme c'est le cas avec la Convention de Vienne sur le droit des traités, ladite réglementation est (a) très peu contraignante (*soft*) et n'a pas de caractère obligatoire (en matière d'assujettissement aux règles, même dans le cas de règles coutumières propres à l'organisation) et (b) inopposable en l'absence d'un mécanisme d'appel effectif (comme dans le cas de la nature consultative et de la portée limitée du mandat de la Cour internationale de Justice qui reste soumis au processus décisionnaire interne des institutions concernées).

La Convention de Vienne sur le droit des traités ayant seulement été adoptée en 1969, il n'est dès lors pas surprenant de ne pas trouver de référence à ses règles interprétatives dans la pratique interprétative antérieure des organisations internationales. Au moment de son adoption, les Nations Unies et un certain nombre d'autres organisations

internationales avaient déjà développé un corpus significatif en matière de pratique interprétative, entièrement basé sur le consentement des Etats membres de ces organisations. Ceci dit, même après l'adoption de la Convention de Vienne, le langage de ses articles 31 et 32 ne semble pas avoir limité la portée des interprétations des organisations internationales.

La pratique du Secrétariat des Nations Unies a reconnu la nécessité d'une interprétation évolutive et qui comble les lacunes.

Le champ étendu des pratiques interprétatives des organisations internationales s'explique également par le caractère général du libellé de nombre des dispositions de leurs actes constitutifs. Un libellé permissif donne la possibilité aux organisations de combler les lacunes organisationnelles, de satisfaire aux intentions des rédacteurs, et de rester pertinentes face aux défis qu'elles affrontent. Les organisations internationales ont toutefois fait preuve de prudence lorsqu'elles avaient à interpréter des dispositions qui limitent spécifiquement leur compétence. Par exemple, seul un amendement fait en vertu de l'article 108 de la Charte des Nations Unies permettrait de restreindre les droits des membres de l'Organisation ou de prévoir les modalités d'exclusion ou de suspension du statut de membre.

La Charte elle-même prévoit les paramètres de fonctionnement de l'Organisation, et fixe ainsi ce qui peut être qualifié de cadre à son champ d'interprétation.

La capacité qu'ont les organisations internationales d'interpréter leurs actes constitutifs sans contrôle externe comprend aussi la capacité qu'elles ont à fixer la limite à cette compétence. Il s'agit d'une capacité similaire à celle déployée par les tribunaux internationaux sous l'appellation de principe de la *compétence de la compétence*.

Un autre facteur semble avoir motivé les rédacteurs de la Charte et, par analogie, des actes constitutifs des agences spécialisées. Il s'agit du fait que les organisations internationales ne peuvent fonctionner qu'à la condition de l'existence d'un consensus entre leurs membres quant à leur direction et fonctionnement. Les organisations internationales sont instituées sur la base de ce que Goodrich et Hambro ont appelé « le principe de coopération volontaire entre les Etats en vue de la promotion d'objectifs communs. » On présume que si les organisations internationales ne parviennent pas à interpréter leurs actes constitutifs d'une manière qui soit compatible avec le droit international et la justice, alors leur dissolution s'ensuivrait naturellement. Paradoxalement, l'exercice d'un contrôle externe sur l'interprétation de leurs actes constitutifs sans le consentement de leurs Etats membres serait tout aussi contre-productif, au point de mener aux dysfonctionnements et même à la

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dissolution. La coopération comme condition essentielle inscrite dans la structure et la manière mêmes qu'ont les organisations de fonctionner fournit un contrôle interne qui répond à leurs besoins interprétatifs. Le contrôle externe au moyen d'un avis consultatif, une option valable pour nombre de ces organisations, nécessite l'obtention du consentement des Etats membres.

Report

I. Introduction

The source and limitations of international organizations' competence to interpret dynamically their constitutive instruments poses legal questions that are at once intractable and mundane. On the one hand, the deliberate decision not to vest any Organ of the United Nations with the exclusive competence to interpret authoritatively the system's constitutive instruments has allowed for a broad and, for the most part, permissive jurisprudence of "constitutional" interpretation to flourish within each organ, subject only to infrequent – and merely advisory – oversight. On the other hand, to restate the obvious, "[e]very international organization is, of course, interpreting its basic instrument in its daily routine work."¹

Accordingly, an inquiry into the concrete "limits" upon the organs' and specialized agencies' ability to interpret their basic constitutive instruments yields few hard and fast universal answers. Although the interpretation of constitutive instruments is a workaday task of international organizations that must interpret their constitutive instruments in light of an endless stream of novel legal issues, the absence of an effective and/or authoritative control system for disciplining any wayward outgrowths of interpretation frustrates the attempt to define fixed limits on those organizations' interpretive competence. Nevertheless, a few general observations are suggested by the jurisprudence of the International Court of Justice ("ICJ" or "the Court") and the work product of the international organizations.

International organizations are, understood for the purposes of this Report, to be those (i) established by multilateral treaties; (ii) these treaties constituting the constitution of these organizations and establishing a distinct legal personality for them which is independent and separate from their Member States, (iii) empowering the international organization with certain goals and functions, and (iv) establishing organs entrusted to pursue those goals and performing those functions.²

¹ Ervin P. Hexner, *Interpretation by Public International Organizations of their Basic Instruments*, 53 AM. J. INT'L L. 341, 341 (1959) [hereinafter "Hexner, Interpretation"].

² It has been observed that: "The characteristic feature of constitutive instruments then is that they create organs capable of assuming a distinct identity and an entity possessing a distinct legal personality from that of the individual member states. This organic-constitutive element not only serves to distinguish these instruments from other multilateral treaties but is a basic factor in the appreciation of any particular aspect of

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In practice, the constituent instruments of international organizations are interpreted almost on a daily basis, by their organs, for the performance of their functions. These instruments are largely drafted in general terms allowing considerable scope for interpretation and adaptation to the changing circumstances which the organizations may encounter. Because of the daily application of their constituent instruments, international organizations are in fact in a continuous process of interpretation, some of which may lead to *de facto*, or informal, modification of these instruments.

As multilateral treaties, these constituent instruments also include amendment procedures. But amendments to multilateral treaties, in general, and to constituent instruments of international organizations, in particular, are cumbersome. Articles 108 and 109 of the Charter of the United Nations (“the Charter”) provide for amendment of the Charter. The two Articles, however, provide significant procedural limitations on adoption and coming into force of amendments. Any amendment to the Charter affecting the rights and obligations of Member States would thus be extremely difficult if not impossible to get adopted and ratified by two-thirds of the membership of the UN including its Permanent Members.³

Nor are constituent instruments of international organizations good candidates for modification by subsequent agreements, or termination of those agreements all together and the rewriting of a new constitution. Hence, interpretation has become a common and an effective tool for international organizations to develop and adapt their constituent instruments continuously to remain effective and relevant to changing circumstances and to facilitate the achievement of their goals.

Bearing in mind the special character of international organizations, the *Institut* has decided to examine the question whether there are any limits to this dynamic interpretation of the constituent instruments of international organizations and, if so, what those limits are. Hence, there is, in the formulation of the topic, a recognition of the competence of international organizations to interpret “dynamically” their own constituent instruments;

the operation of these instruments.” Ralph Zacklin, *The Amendment of the Constitutive Instruments of the United Nations and Specialized Agencies* 8 (2005).

³ Zacklin suggests that: “The incidence of informal amendment in respect to specific organizations is related to the degree of effectiveness of the formal amendment procedure. Since, ... constitutive instruments undergo a constant process of adaptation in the course of their operation, amendments which cannot be formalized will inevitably be brought about by the constant practice of the parties.” *Id.*, at 26.

the question is if there are any limits to this competence. The Report reviews the practice of international organizations for the purpose of determining if there is such a competence and if so, if it is subject to any limits.

The emphasis in this Report will be on the UN and the UN Specialized Agencies (“Specialized Agencies”). The Report is structured to provide an overview of the consideration of questions of interpretation of the Charter during the San Francisco Conference in 1945, followed by the practice of the various UN organs with respect to their interpretation of the Charter, with special attention to the advisory opinions, and judgments of the ICJ which bear on the interpretative exercise of the Organs of the UN or of the Specialized Agencies. The Report also reviews the history of Article 5 of the Vienna Convention on the Law of Treaties (“VCLT”) with regard to its caveat about its application to the constituent instruments of international organizations. Various interpretative theories are also examined.

II. San Francisco: The *Travaux* of the Charter

The UN Charter is silent regarding the capacity of its organs or its Member States to interpret its provisions. The omission was not accidental: the possibility of including a provision that would expressly empower a particular Organ of the UN to engage in interpretation was discussed at the San Francisco Conference, but the proposal to so empower it was rejected.

A. *Committee IV/2 of the San Francisco Conference*

The question of interpretation of the Charter was originally presented to Committee I/2 which referred the question to Committee IV/2 (Legal Problems). During the latter’s discussion, some States expressed concern that conflicts of jurisdiction to apply some provisions of the Charter might arise and it would be useful to determine which Organ of the UN could interpret the Charter. Other States were of the view that in the context of the Statute of the Court, it was the ICJ that has the competence to interpret its own Statute, and “by analogy, it was argued that the General Assembly was the logical body to interpret the provisions of the Charter which did not clearly pertain to any other organ”.⁴

Committee IV/2 established a Subcommittee to consider the question on interpretation of the Charter and referred the following question to the

⁴ Documents of The United Nations Conference on International Organization San Francisco, 1945, Vol. XIII, 633 - 634 (1985). [hereinafter “U.N.C.I.O., Vol 13”]

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Subcommittee: “How and by what organ or organs of the Organization should the Charter be interpreted?”⁵ Belgium had proposed that any disagreement between the Organs of the UN on the interpretation of the Charter should be referred to the ICJ and if the ICJ refused jurisdiction, that an amendment to the Charter as provided by Chapter XI of the Charter be pursued. The Subcommittee, having considered the Belgian proposal, rejected it.⁶ The Subcommittee did not see any obstacles for two States, which may have disagreements between themselves on the interpretation of a particular provision of the Charter, to submit their disagreement to the ICJ nor was there any problem for Organs of the UN, if they disagreed about the interpretation of a particular provision of the Charter, to ask the ICJ for an advisory opinion, to consult each other or to seek the views of a committee of jurists. This was as far as the Subcommittee could agree. Accordingly, the Subcommittee’s report stated that:

... if two member states are at variance concerning the interpretation of the Charter, they are free to submit the dispute to the Court, and that if two organs are at variance concerning the correct interpretation of the Charter they may either ask the Court for an advisory opinion, establish an ad hoc committee of jurists to examine the question and report its views, or have recourse to a joint conference.⁷

Committee IV/2, while recommending no text on the question of interpretation of the Charter, unanimously adopted a report summarizing the Committee’s conclusions and annexed it to its report.⁸ The final

⁵ *Id.*, at 687.

⁶ *Id.*, at 645.

⁷ *Id.*, at 646.

⁸ The conclusions read: “In the course of the operation from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers. It will be manifested in the functioning of such a body as the General Assembly, the Security Council, or the International Court of Justice. Accordingly, it is not necessary to include in the Charter a provision either authorizing the normal operation of this principle.

Difficulties may conceivably arise in the event that there should be a difference of opinion among the organs of the Organization concerning the correct interpretation of a provision of the Charter. Thus, two organs may conceivably hold and may express or even act upon different views. Under unitary forms of national government the final determination of such a question may be vested in the highest court or in some other national authority. However, the nature of the Organization and of its operation would not seem to be such as to invite the inclusion in the Charter of any provision of this nature. If two Member States are at variance concerning the correct interpretation of the

report described the reasons for the omission from the Charter of a provision that would empower and regulate the organs' capacity to interpret the Charter. Committee IV/2 explained the "inevitable" reality that "each organ will interpret such parts of the Charter as are applicable to its particular functions," and it accepted that "[t]his process is inherent in the functioning of any body which operates under an instrument defining its functions and powers."⁹ That said, Committee IV/2 continued, "[i]t is to be understood ... that if an interpretation made by any organ of the Organization ... is not generally acceptable it will be without binding force."¹⁰

Committee IV/2's resolution established a basic principle that will be explored throughout this report. That is, that each Organ of the UN is empowered to interpret its own constitutive instrument with very little by way of concrete limitation. Instead, each organ interprets its constitutive instrument without binding oversight by other organs. In practice, however, interpretation by the subsidiary organs of the constituent instruments is subject to review by the organs that established them.

B. Belgium's Proposals

During the negotiation of the Charter, in the context of the discussion of the powers of the UN General Assembly (the "General Assembly"), Belgium also proposed that "[t]he General Assembly has sovereign competence to interpret the provisions of the Charter."¹¹ Belgium

Charter, they are of course free to submit the dispute to the International Court of Justice as in the case of any other treaty. Similarly, it would always be open to the General Assembly or to the Security Council, in appropriate circumstances, to ask the International Court of Justice for an advisory opinion concerning the meaning of a provision of the Charter. Should the General Assembly or the security Council prefer another course, an ad hoc committee of jurists might be set up to examine the question and report its views, or recourse might be had to a joint conference. In brief, the Members or the organs of the Organization might have recourse to various expedients in order to obtain an appropriate interpretation. It would appear neither necessary nor desirable to list or to describe in the Charter the various possible expedients.

It is to be understood, of course, that if an interpretation made by any organ of the Organization or by a committee of jurists is not generally acceptable it will be without binding force. In Such circumstances, or in cases where it is desired to establish an authoritative interpretation as a precedent for the future, it may always be accomplished by recourse to the procedure provided for amendment." *Id.*, at 668-669.

⁹ *Id.*, at 668.

¹⁰ *Id.*, at 669.

¹¹ Documents of The United Nations Conference on International Organization San Francisco, 1945, Vol. III, 339 (1985) [hereinafter 1945 UN Docs Vol. III].

explained that this proposal was for practical reasons and also intended to avoid imposing the interpretation by a single State of the Charter on other members, as occurred in the experience of the League of Nations (“the League”). This proposal also failed to gain support.

The interpretation of the Charter, this time in terms of a review of the decisions of the UN Security Council (“Security Council”), was also raised by Belgium. In the consideration of Chapter VII, Section A of the Dumbarton Oak proposal which became Chapter VI (Pacific Settlement of Disputes), Belgium submitted a proposal that would allow any State, that was party to a dispute before the Security Council, to request the ICJ to review a decision of the Security Council:

Any State, party to a dispute brought before the Security Council, shall have the right to ask the Permanent Court of International Justice whether a recommendation or a decision made by the Council or proposed in it infringes on its essential rights. If the Court considers that such rights have been disregarded or are threatened, it is for the Council either to reconsider the question or to refer the dispute to the Assembly for decision.¹²

Belgium explained that judicial security was next to political security in importance:

... to give States whose differences are submitted to the Security Council the possibility of allowing the Court to express its opinion on the existence of any essential rights they may consider to be threatened or disregarded by the discussions or decisions of the Security Council. If the Court should consider that such rights have in fact been threatened or disregarded, it would be the duty of the Council either to reconsider the question and maintain or modify its conclusions, or to refer the matter to the Assembly.¹³

Further explaining its proposal, Belgium stated that the Security Council should be obligated either to “reconsider the question or to refer the dispute to the General Assembly for a decision.”¹⁴ This proposal was opposed by the sponsoring governments (China, Soviet Union, United Kingdom and the United States).

Opposing the Belgian proposal, the United States stated that the actions taken by the Security Council in respect of matters dealing “with disputes involving a threat to the peace be taken ‘in accordance with the purposes

¹² *Id.*, at 336.

¹³ *Id.*, at 336-337.

¹⁴ Documents of The United Nations Conference on International Organization San Francisco, 1945, Vol. XII, 48 - 49 (1985).

and principles of the Charter.”¹⁵ The representative of the United States referred to the amended Chapter 1 on the purposes of the Charter which provided that the Organization “is to bring about the peaceful settlement of disputes ‘with due regard for principles of justice and international law.’”¹⁶ Hence he believed that “the Security Council was bound to act in accordance with the principles of justice and international law.”¹⁷ France also opposed Belgium’s proposal, and the Soviet Union found the Belgian proposal incompatible with the purposes of the Charter. It:

considered that the Belgian Amendment would have the effect of weakening the authority of the Council to maintain international peace and security. If it were possible for a state to appeal from the Council to the International Court of Justice, and if there were the further possibility of an ultimate reference to the General Assembly, the Council would find itself handicapped in carrying out its functions. In such circumstances, the Council might even be placed in a position of being a defendant before the Court.¹⁸

The United Kingdom opposed Belgium’s proposal not only on the ground that it would be “prejudicial to the success of the organization” but also on the ground that it was unnecessary because the Council was “obligated to act in a manner consistent with the purposes and principles of the Organization.”¹⁹ In addition, in the view of the United Kingdom, Belgium’s proposal would “result in the decision by the Court of International Justice [sic] of political questions in addition to legal questions. ... [and this] would seriously impair the success of its [Court’s] role as a judicial body.”²⁰ The United Kingdom further noted somewhat obscurely that a majority of the members of the Security Council “would be composed of small states, and it [the Council] would be obligated to act in a manner consistent with the purposes and principles of the Organization.”²¹ It seems that the United Kingdom was suggesting that because the majority of the members of the Security Council will be non-Permanent Members, they act as a restraining force on the Permanent Members should those Members wish to act in manner not consistent with the purposes and principles of the Charter.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*, at 65.

²⁰ *Id.*

²¹ *Id.*

Failing to gain support, Belgium withdrew its proposal after explaining that the Security Council's decisions under Chapter VI of the Charter on "Pacific Settlement of Disputes" are recommendations.²² Hence, it appears that Belgium's proposal may not have been concerned with Chapter VII decisions of the UNSC dealing with threat to the peace, breaches of the peace, and acts of aggression.

C. Summary Conclusions

The legislative history of the Charter reveals that the question of interpretation of the Charter was considered carefully in more than one context. It appears that it was felt that any procedure for providing an authentic and binding interpretation of the Charter was inconsistent with the character and the premise of the UN as an organization of sovereign States, which might impose on them obligations without their consent.²³ The legislative history also indicates that the negotiating States foresaw that leaving each organ with an inherent power to interpret authoritatively its constitutive instrument might yield discordant interpretations, and it explored whether it would be advisable to "vest" the primary competence to resolve interpretive differences in one particular Organ. It was concluded that "the nature of the Organization and of its operation would not seem to be such as to invite the inclusion in the Charter of any provision of this nature."²⁴ After canvassing a number of *ad hoc* alternatives that States might use to resolve interpretive differences, the drafters deliberately left out any procedure for authoritative interpretation of the Charter. To the contrary: "in cases where it is desired to establish an authoritative interpretation as a precedent for the future, it may always be accomplished by recourse to the procedure provided for amendment."²⁵ The result, as Louis Sohn explained, is that the San Francisco Conference's proviso that "an interpretation ... [that] is not generally acceptable ... will be without binding force" has been "turn[ed] around" so that today, "an interpretation made by an organ of the Organization which is generally acceptable is binding, or to use the more common phrase, ... authoritative."²⁶ This also has the effect of allowing

²² *Id.*, at 66.

²³ D. Ninčić, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations* 324-25 (1970); TETSUO SATŌ, *EVOLVING CONSTITUTIONS OF INTERNATIONAL ORGANIZATIONS* 165 (1996).

²⁴ U.N.C.I.O., Vol 13, *supra* note 4, at 709.

²⁵ *Id.*, at 710.

²⁶ Louis B. Sohn, *The UN System As Authoritative Interpreter of Its Law*, in 1 UNITED NATIONS LEGAL ORDER 169, 174 (Schachter & Joynter, eds., 1995).

a broad scope of flexibility to Member States of the UN to interpret the Charter in a more efficient manner, to the extent that there is a general agreement among the State members, without the delay which is inherent in an amendment procedure. One further noticeable effect of this interpretive competence of the Organs of the UN is the absence of a requirement of unanimity. The words “generally acceptable” anticipate that there may be States that will not agree to a particular interpretation, but their disagreement will not undermine the authoritative character of the interpretation.

III. The Vienna Conventions and the Special Status of the Constituent Instruments of International Organizations

A. The Vienna Convention on the Law of Treaties (1969)

Articles 31 and 32 of the Vienna Convention on the Law of Treaties (“VCLT”) set forth the rules of treaty interpretation. While the drafters of the Vienna Convention intended to design interpretative rules that applied to all treaties, they were conscious of the special character of treaties that were constituent instruments of international organizations.

During the drafting of the VCLT, the International Law Commission (“ILC”) anticipated the special situation and status of international organizations. At the early stages of negotiations, in 1950-1951, the Special Rapporteur of the topic, Professor Brierly, raised the issue of international organizations, in the context of their capacity to conclude treaties.²⁷ Ten years later, Sir Humphrey Waldock, who succeeded Brierly as Special Rapporteur, introducing his own approach to the topic, in his first report, recommended to set aside the applicability of the law of treaties to international organizations until further progress had been made on the topic which would enable the ILC to make a more informed decision.²⁸ As the work progressed, the ILC drew a distinction between

²⁷ Summary Records of the Third Session, [1951] Y.B. Int’l L. Comm’n 136, Vol. I, U.N. Doc. A/CN.4/SER.A/1951.

²⁸ The Commission concluded: “The Commission again considered the question of including provisions concerning the treaties of international organizations in the draft articles on the conclusion of treaties. The Special Rapporteur had prepared, for submission to the Commission at a later stage in the session, a final chapter on treaty-making by international organizations. He suggested that this chapter should specify the extent to which the articles concerning States apply to international organizations and formulate the particular rules peculiar to organizations. The Commission, however, reaffirmed its decisions of 1951 and 1959 to defer examination of the treaties entered into by international organizations until it had made further progress with its draft on treaties concluded by States. At the same time the Commission recognized that

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those parts of the draft which required a caveat as regards their application to treaties that are constituent instruments of international organizations and those treaties drafted within international organizations, on the one hand, and other treaties, on the other. In this approach, the Special Rapporteur lumped together treaties that are constituent instruments of international organizations and those that are formulated within an international organization as distinct from treaties formulated by States and adopted within a diplomatic conference. For those provisions dealing with the conclusion of treaties forming the original part I of the draft on the conclusion of treaties, the ILC found it necessary to make a distinction between these two different categories of treaties.²⁹ With regard to original part II of the draft, dealing with grounds of invalidity of treaties, the ILC did not find it necessary to make a distinction between these different types of treaties.³⁰ As for original section III, concerning the termination or suspension of the operation of treaties and withdrawal from multilateral treaties, the ILC felt that the provisions may infringe on the internal law of international organizations to some extent and made a proviso in the form of Draft Article 48 which was adopted in 1963 and entitled, "Treaties which are constituent instruments of international organizations or which have been drawn up within international organizations". The draft Article read:

Where a treaty is a constituent instrument of an international organization, or has been drawn up within an international organization, the application of the provisions of part II, section III, shall be subject to the established rules of the organization concerned.³¹

international organizations may possess a certain capacity to enter into international agreements and that these agreements fall within the scope of the law of treaties. Accordingly, while confining the specific provisions of the present draft to the treaties of States, the Commission has made it plain in the commentaries attached to articles 1 and 3 of the present draft articles that it considers the international agreements to which organizations are parties to fall within the scope of the law of treaties." Documents of the fourteenth session including the report of the Commission to the General Assembly, [1962] Y.B. Int'l L. Comm'n 161, § 21, Vol II, U.N. Doc. A/CN.4/SER.A/1962/Add.1.

²⁹ Documents of the fifteenth session including the report of the Commission to the General Assembly, [1963] Y.B. Int'l L. Comm'n 213, Vol II, U.N. Doc. A/CN.4/SER.A/1963/ADD.1.

³⁰ *Id.*

³¹ *Id.*

In 1965, the Commission entered into a second reading of the text having reviewed comments by Governments.³² Among the comments, only a few commented on draft Article 48 and with the exception of two, they endorsed the Commission's draft Article. The two substantive comments were submitted, respectively, by Israel and the United States. Israel asked for the expansion of the scope of the application of the draft Article to other sections of Part II of the draft and for placing it earlier in the draft.³³ Comments by the United States, while supporting the view that treaties forming the constituent instrument of international organizations were of a special character, expressed the view that further study was necessary as to the place of a provision as such in a general convention because it could be construed that the international organization may completely ignore the provisions of section III which dealt with the termination or suspension of the operation of treaties and withdrawal from treaties.³⁴

The Special Rapporteur, in the context of the second reading, recommended to move draft Article 48 dealing with international organizations to the part on general provisions as draft Article 3(bis).³⁵

³² Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly, [1966] Y.B. Int'l L. Comm'n 279-361, Vol. II, U.N. Doc. A/CN.4/SER. A/1966/Add. I.

³³ The relevant part of the Comment by Israel reads: "Consideration should be given to whether article 48, which is in principle correct, should not be framed in more general terms covering also sections III, IV, V and VI of part II, and placed after the present article 2. That could lead to a simplification of part I, similar to that intended for part II by article 48. In fact, similar provisions already appear in articles 5, 6, 7, 9, 18(I)(a), 20(4), 27(4), 28 and 29(8). Such generalization would correspond, it is believed, to existing practice as regards the two types of treaties to which article 48 applies" *Id.*, at 297, § 21.

³⁴ The relevant part of the US Comments reads: "The United Nations, as a party in interest, will recognize that article 48 of the draft has particular importance. The text concerns the very special case of treaties which are the constituent instruments of international organizations or which have been drawn up by international organizations. The text recognizes that an international organization must proceed in accordance with its established rules in reaching decisions and taking action. The United States emphatically agrees with this principle. But considerable study is apparently necessary to determine whether, and to what extent, a general convention on the law of treaties can easily include a provision such as article 48. The phrase 'subject to the established rules of the organization' might, for example, be construed as meaning that the organization was completely free to ignore the provisions covered in section III if it chose to do so on the basis of some established rule of the organization." *Id.*, at 355.

³⁵ Documents of the first part of the seventeenth session including the report of the Commission to the General Assembly, [1965] Y.B. Int'l L. Comm'n 18, Vol II, U.N. Doc. A/CN.4/SER.A/1965/Add.I.

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The reason advanced by the Special Rapporteur was not to apply the caveat of draft Article 48 to all the articles, but only to certain articles which did not deal with interpretation. His proposed redraft for draft Article 3bis was:

The application of the present articles, with the exception of articles 31-37 and article 45, to treaties which are constituent instruments of an international organization or have been drawn up within an organization shall be subject to the established rules of the organization concerned.³⁶

But the restrictions in draft Article 3(bis) were removed in the Drafting Committee. The modified text read:

The application of the present articles to treaties which are constituent instruments of an international organization or are adopted within an international organization shall be subject to any relevant rules of the organization.³⁷

In explaining the changes in the draft Article, the Chairman of the Drafting Committee made two comments. First he said that “the modification to article 3(bis) did not affect the substance.”³⁸ But then he immediately said that: “It would be noted that the new formulation

³⁶ The Special Rapporteur explained the proposal in the following way: “At a number of places in the draft articles it is necessary to make a reservation regarding the application of the rule in question in the case of constituent instruments of international organizations and sometimes also of treaties drawn up within an organization. The Commission has inserted such a reservation in certain articles, and when dealing with the termination of treaties in part II, section III, it made a general reservation to the same effect in article 48 covering all the articles of that section. There are some articles, however, where such a reservation might be considered necessary or prudent but with regard to which the Commission has not made the reservation; for example, article 9, concerning the participation of additional States in treaties, and articles 65-68, concerning the modification of treaties. The Special Rapporteur suggests that the reservation in article 48 should be transferred to the ‘General Provisions’ part and made to cover, in principle, the draft articles as a whole. In that event the only question that might arise would be whether to except specifically the articles contained in part II, section II, dealing with the invalidity of treaties, and article 45, dealing with the emergence of a new norm of *jus cogens*, or to leave that to be understood from the very nature of the articles. Although the present text of article 48 does not exclude article 45 from its scope, the Special Rapporteur is inclined to think that it would be more logical to except from the general reservation the rules in part II, section II, which include invalidity resulting from coercion and the violation of a norm of *jus cogens*.” *Id.*

³⁷ Summary records of the eighteenth session, [1966] Y.B. Int’l L. Comm’n 294 § 79, Vol. I, (Part Two), U.N. Doc. A/CN.4/SER.A/1966.

³⁸ *Id.*

provided the necessary saving clause to cover cases when there was no relevant rule.”³⁹

The modification by the ILC, on its face, extended the application of the new article to the entire convention. The new formulation subjected the application of the draft convention to constituent instruments of international organizations to the rules of these organizations. Reformulated draft Article 3(bis) was renumbered as draft Article 4 which went to the Vienna Conference. The Commentary to draft Article 4 is explicit on its purpose: avoiding unintended consequences of the law of treaties on the constituent instruments of international organizations and on treaties concluded within organs of international organizations. It reads in relevant part:

- (1) The draft articles, as provisionally adopted at the fourteenth, fifteenth and sixteenth sessions, contained a number of specific reservations with regard to the application of the established rules of an international organization. In addition, in what was then part II of the draft articles and which dealt with the invalidity and termination of treaties, the Commission had inserted an article (article 48 of that draft) making a broad reservation in the same sense with regard to all the articles on termination of treaties. On beginning its re-examination of the draft articles at its seventeenth session, the Commission concluded that the article in question should be transferred to its present place in the introduction and should be *reformulated as a general reservation covering the draft articles as a whole*. It considered that this would enable it to simplify the drafting of the articles containing specific reservations. *It also considered that such a general reservation was desirable in case the possible impact of rules of international organizations in any particular context of the law of treaties should have been inadvertently overlooked.*
- (2) The Commission at the same time decided that the categories of treaties which should be regarded as subject to the impact of the rules of an international organization and to that extent excepted from the application of this or that provision of the law of treaties ought to be narrowed. Some reservations regarding the rules of international organizations inserted in articles of the 1962 draft concerning the conclusion of treaties had embraced not only constituent instruments and treaties drawn up within an organization but also treaties drawn up “under its auspices”. ...
- (3) Certain Governments, in their comments upon what was then part III of the draft articles (application, effects, modification and interpretation), expressed the view that care must be taken to avoid allowing the rules of international organizations to restrict the freedom of negotiating States

³⁹ *Id.*, at 294, § 80.

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unless the conclusion of the treaty was part of the work of the organization, and not merely when the treaty was drawn up within it because of the convenience of using its conference facilities. Noting these comments, the Commission revised the formulation of the reservation at its present session so as to make it cover only “constituent instruments” and treaties which are “adopted within an international organization”. This phrase is intended to exclude treaties merely drawn up under the auspices of an organization or through use of its facilities and to confine the reservation to treaties the text of which is drawn up and adopted within an organ of the organization.⁴⁰

At the Vienna Conference, several delegations favored deletion of draft Article 4, while representatives of international organizations pleaded for its retention.⁴¹ Wilfred Jenks, the observer from the International Labour Organization (“ILO”), stressed that the exception for the constituent instruments of international organizations had a vital significance for the long-term development of international organizations and of international law. He said that he was not suggesting any modification of the general law as proposed in the draft articles but only a recognition that a *lex specialis* might be applicable to constituent instruments of international organizations by virtue of any relevant rules, including the established practice of the organization concerned. He noted that the codification of international law should not be a bar, but rather a stimulus to progressive development of international law.⁴² Some delegations supported an

⁴⁰ Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly, [1966], *supra* note 32, at 191 (emphasis added).

⁴¹ United Nations Conference on the Law of Treaties, First Session, Official Records, 42-58, U.N. Doc. A/CONF.39/11 (26 Mar. -24 May, 1968).

⁴² Mr. Jenks said:

“3. Articles 3 and 4 of the draft stated principles of vital significance for the long-term development of international organizations and of international law. Article 4 stated both a rule and an exception. The rule was that treaties adopted within an international organization were subject in principle to the general law of treaties, and the exception was that the rule was not applicable in respect of matters for which a *lex specialis* existed by virtue of any relevant rules, including the established practice of the organization concerned.

4. The rule was important because it would create confusion if there were a different law of treaties for the instruments adopted within each of the forty international and regional organizations, a number which might continue to increase. Few of them could be expected to evolve a distinctive body of practice and none could claim that its practice or needs were special in respect of the whole of the law of treaties. The ILO certainly made no such claim.

exception in the law of treaties for the constituent instruments of international organizations and treaties concluded within international organizations. Sir Francis Vallat, the representative of the United Kingdom, stated:

Perhaps the most striking development in the international field in the twentieth century had been the growth of international organizations and the part they played in relations between States. Each organization had a constitution, rules and practices designed to meet its own needs. It was vital that, in the codification of the law concerning treaties between States, the texture which had been and would in future be, created by international organizations should not be inadvertently destroyed or damaged.⁴³

Professor Virally, the representative of France, supporting the exception, referred to the increasingly important role of international organizations in contemporary life. He noted that a treaty which is the constituent instrument of an organization could be identified by its object. He thought the similarities between regular treaties and those that are constituent instruments of international organizations end once they enter into force. Ordinary treaties are applied by State parties through their

5. The exception was equally important because there were cases in which an organization had special rules and a well-established body of practice governing conventions which created a body of international obligations more coherent, stable and better-adapted to requirements of the situation than could be secured by applying the more flexible provisions of the general law.

12. ILO practice on interpretation had involved greater recourse to preparatory work than was envisaged in article 28.

17. He was not suggesting any modification of the general law as proposed in the draft articles, but asked for a clear recognition that an international organization might have a *lex specialis* that could be modified by regular procedures, in accordance with established constitutional processes. The questions at issue were not limited to procedural ones and were too complex to be dealt with by detailed amendments to the draft articles and could only be properly covered by a broad and comprehensive provision. The practical importance of those procedures for member States depended on the extent to which they were parties to international labour conventions and must be assessed in the light of long-range considerations of general international policy.

19. International legislative techniques remained so defective that the way must be left open to develop specialized procedures for special purposes as the need arose. One of the prior requirements in codifying international law had been to ensure that it did not operate as a bar rather than as a stimulus to progressive development. If the law of treaties had been codified a generation ago, much of the present draft would have found no place in it. Article 4 provided the necessary flexibility for the progressive attainment of the long-term purposes of the United Nations Charter, and he hoped that it would be adopted substantially in its present form." *Id.*, at 36-37.

⁴³ *Id.*, at 44, § 31.

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executive, legislative and judicial organs. But in the case of treaties that are constituent instruments of international organizations, they are applied both by the State parties as members of the organization and by the organs of the organization which produce a whole series of consequences which the draft convention could not cover.⁴⁴

Sir Humphrey Waldock, the Special Rapporteur for the topic, who was present as the expert consultant, stated:

some representatives had interpreted article 4 as though the International Law Commission had intended to make a general reservation in favour of international organizations and relegate the provisions of the convention to the background. That had not been the intention of the Commission, which, on the contrary, had proceeded on the assumption that the provisions of the convention would be generally applicable to all treaties. The wording of article 4 as it appeared in the draft was the logical outcome of stating an exception.⁴⁵

In introducing the Article to the Plenary of the Conference, the Chairman of the Drafting Committee stated that the “term ‘rules’ [of the organization] in article 4 applied both to written rules and to unwritten customary rules”.⁴⁶

⁴⁴ Professor Virally stated:

“40. Mr. Virally (France) thought that in view of the increasingly important role of international organizations in contemporary life and in the formation of international law, article 4 was one of the most significant articles in the draft convention. It raised various problems which should be carefully differentiated.

41. A treaty which was the constituent instrument of an organization could be identified by its object. At the conclusion stage it was comparable to any other treaty, but the position changed when it entered into force. Ordinary treaties were applied by the States parties to them through their executive, legislative and judicial organs. A treaty which was the constituent instrument of an organization was applied both by the parties as members of the organization and by the organs of the organization. That produced a whole series of consequences which the draft convention could not cover. The inclusion of constituent instruments of international organizations in article 4 was therefore justified.

42. Treaties concluded within an organization did not have the same unity. Some treaties were adopted merely for reasons of convenience, and there would be no justification for trying to infer legal consequences from that fact. ...

43. The question therefore arose in what cases the application of a special legal regime was justified. The French delegation thought it was justified for treaties whose adoption constituted the actual function of the organization—treaties which were inseparable from its constituent instrument and from its very existence.” *Id.*, at 45-46.

⁴⁵ *Id.*, at 56-57, § 34.

⁴⁶ *Id.*, at 147, § 15.

B. The Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (1986)

The question of the special status of constituent instruments of international organizations received even less attention during the drafting of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations. The Convention is not yet in force. However, it is included and discussed to reflect the views of the ILC and Governments with regard to the subject matter of the Report.

The Special Rapporteur on the topic in the ILC, Professor Paul Reuter, did not recommend a parallel article 5 of the 1969 Vienna Convention. It was the ILC which decided it would be useful to recognize the special nature of these treaties. Hence a parallel provision was incorporated by the ILC in the text. The text in Article 5 recommended by the ILC makes clear that the articles apply to constituent instruments of international organizations. It reads:

The present articles apply to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization, without prejudice to any relevant rules of the organization.⁴⁷

⁴⁷ Commentary to draft Article 5 provides a summary history of the article in the Commission: “(1) In its first reading of the draft articles, the Commission subscribed to the Special Rapporteur’s view that there was no need for a provision paralleling article 5 of the Vienna Convention.

(2) On reviewing the question, the Commission came to the conclusion that even though its substance would relate to what are still rather exceptional circumstances, such a provision was perhaps not without value; it has therefore adopted a draft article 5 which follows exactly the text of article 5 of the Vienna Convention. The differences resulting from the attribution to the term “treaty” of a distinct meaning in each of those texts must now be spelt out and evaluated.

(3) First, draft article 5 evokes the possibility of the application of the draft articles to the constituent instrument of one organization to which another organization is also a party. While—with the exception of the special status which one organization may enjoy within another as an associate member there of—such cases are at present rare, not to say unknown, there is no reason to consider that they may not occur in the future. There are already commodity agreements admitting as members certain organizations having special characteristics. However, the Commission did not feel it necessary to draw from this the consequence that the definition of the expression “international organization” should be amended to take account of such cases, for they will most probably never involve more than the admission by an essentially intergovernmental organization of one or two other international organizations as members. The

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International organizations themselves seem to have had less concern about article 5 as recommended by the ILC. Only three international organizations within the UN system commented on the first draft prepared by the ILC (UN, ILO and FAO) and they made no comments on draft article 5.⁴⁸

During the Vienna Conference of 1986, while some commented on draft article 5, little concern was voiced by States or international organizations themselves. The Special Rapporteur, in the capacity of consultant at the Conference, referring to article 5, said that international organizations had three concerns in relation to the 1969 Vienna Convention. First, that the 1969 Convention should take account of the special rules of organizations. Second, that the constituent instruments of international organizations were special treaties that could not be affected by a general treaty. And third, the manner by which the future treaty could affect international organizations even in an indirect way. Professor Reuter stated that the final concern was addressed by Article 34 since a treaty did not create obligations for a third State without its consent and the same would apply to international organizations.⁴⁹ Draft article 5 was

Commission did not consider the hypothesis that an international organization might have nothing but international organizations as members. One member of the Commission did, however, express the view that, for the moment, it would have been sufficient to deal in article 5 with the hypothesis discussed in paragraph (4) below.

(4) Second, draft article 5 extends the scope of the draft to treaties adopted within international organizations. Such a situation arises principally when a treaty is adopted within an international organization of which another such organization is a member. But it is also conceivable that an international organization all of whose members are States might adopt a treaty designed for conclusion by international organizations or by one or more international organizations and one or more States. In referring to "the adoption of a treaty", article 5 seems to mean the adoption of the text of a treaty, and it is, for example, conceivable that the text of a treaty might be adopted within the United Nations General Assembly, even though certain organizations might subsequently be invited to become parties to the instrument."

Report of the Commission to the General Assembly on the work of the thirty-fourth session, [1982] Y.B. Int'l L. Comm'n 23, Vol II, U.N. Doc. A/CN.4/SER.A/1982/Add. I (Part 2).

⁴⁸ For Comments by states and by international organizations see Report of the Commission to the General Assembly on the work of the thirty-third session, [1981] Y.B. Int'l L. Comm'n 181 – 203, Vol. II (Part Two), U.N. Doc. A/CN.4/SER.A/1982/Add. I.

⁴⁹ United Nations Conference on the Law of Treaties Between States and International Organizations or Between International Organizations, Vienna, Official Records, 61 § 71-72, U.N. Doc. A/CONF.129/16 (Vol. I) (Feb. 18 - Mar. 21, 1986).

thus adopted with some minor drafting changes and tracks Article 5 of the 1969 Vienna Convention.⁵⁰

In its Article 2 on Use of Terms the 1986 Convention includes the wording “constituent instruments of international organizations” in the definition on “rules of organization”:

1(j) “rules of the organization” means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization.

It also includes a “without prejudice clause” with respect to any other meaning which might be given to that term in any organization:

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State or in the rules of any international organization.

Hence while the rules of interpretation set forth in the 1986 Vienna Convention apply to the constituent instruments of international organizations parties to that Convention, what effect the qualification in Article 5 might have on those interpretative rules is unclear.

C. Summary Conclusions

The special status of treaties that are constituent instruments of international organizations was recognized by the ILC when formulating the 1969 Vienna Convention and by a number of States participating at the Vienna Conference. Less attention was paid by the ILC and the international organizations during the drafting of the 1986 Convention or during the 1986 Vienna Conference itself. It appears that it was felt that the exception in Article 5, now in both Conventions, was sufficient to address any future applications of the Conventions to the constituent instruments of international organizations.

It thus seems that neither of the Conventions subjects the interpretations performed by international organizations of their constituent instruments to any meaningful limitations. In fact, since the rules of interpretation are

⁵⁰ Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Art. 5, Mar. 21, 1986, 25 I.L.M. 543, reads:
“Article 5 - Treaties constituting international organizations and treaties adopted within an international organization

The present Convention applies to any treaty between one or more States and one or more international organizations which is the constituent instrument of an international organization and to any treaty adopted within an international organization, without prejudice to any relevant rules of the organization.”

subject to the “rules of the organizations” and the “established practice” of the organizations, which themselves could evolve through interpretation and more practice, interpretation becomes a circular process, in which there can be no limitation to the evolution of the interpretation performed by the organization.

IV. Interpretation of the Constituent Instruments of International Organizations by the Organizations Themselves

A review of the practice of the UN and of the legal opinions of its Secretariat shows the extent to which interpretation by the organs of the provisions of the Charter proceeds largely unchallenged in the absence of any authoritative oversight, and the extent to which those interpretations harden into authoritative practice.

Article 102(2) of the Charter, for example, prohibits States from “invoking” any agreement that has not been registered with the Secretariat “before any organ of the UN.” However, as the Secretariat observed in 1979, there are “hundreds” of examples in the Secretariat’s practice of States submitting new treaties for registration that incorporate provisions of old treaties that were never registered.⁵¹ The Secretariat explained that the *travaux* of the Charter gave no guidance on how the Secretariat should proceed where that problem arises, but recounted that its uniform approach has been to write to the States intending to register their new treaty to suggest that they also register the prior agreement, partially incorporated in the new treaty. Furthermore, the Secretariat has adopted the practice of holding the new treaty in “abeyance” if knowledge of the referenced prior agreements is “necessary for the application of the new agreement.”⁵² Although the Secretariat could recount no instance in which its practice had been “formally contested,” it acknowledged that its “practice, although rational, is not expressly provided for in the Charter or in the regulations.”⁵³ This could be a problem, the Secretariat observed, since “an organ of the United Nations other than the Secretariat may have already taken a position ... by allowing an unregistered agreement to be invoked before it - e.g., the Security Council.”⁵⁴

⁵¹ See 1979 U.N. Jurid. Y.B. 196, U.N. Doc. ST/LEG/SER.C/17.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 196-97.

Other provisions of the Charter can theoretically subject the internal organs' and organizations' interpretations to non-binding advisory oversight. Article 96(1) of the Charter in particular permits the General Assembly and the Security Council to request the ICJ to render an advisory opinion on "any legal question,"⁵⁵ while article 96(2) permits other organs and authorized Specialized Agencies to request advisory opinions on "legal questions arising within the scope of their activities."⁵⁶ Giving the ICJ advisory jurisdiction over certain questions submitted by the Specialized Agencies was a "complete innovation"⁵⁷ in terms of the League's system; under the Covenant, an organization seeking an advisory opinion would have had to use the Council or Assembly as a "go-between in transmitting to the Court requests for advisory opinions."⁵⁸ Article 96(2) removed, as it were, the "go-between" and permitted authorized Specialized Agencies to apply directly to the ICJ.⁵⁹

Sixteen Agencies and three organs have since been authorized to submit requests for advisory opinions to the ICJ.⁶⁰ But, as the text of Article 96 makes clear, the ICJ's advisory jurisdiction in such cases is limited to only those legal questions that "aris[e] within the scope of the [agencies']

⁵⁵ U.N. Charter, Art. 96(1).

⁵⁶ U.N. Charter, Art. 96(2).

⁵⁷ Leland Goodrich & Edvard Hambro, *Charter of the United Nations Commentary and Documents* 489 (2nd ed. 1949).

⁵⁸ *Id.*, at 489. The International Labor Organization, for example, submitted six such requests for advisory opinions under the League system. See *Id.*

⁵⁹ See generally Joseph Sulkowski, *Competence of the International Labor Organization*, 45 AM. J. INT'L L. 286, 308-09 (1951).

⁶⁰ The authorized specialized agencies are: the International Labor Organization (ILO); Food and Agriculture Organization of the United Nations (FAO); United Nations Educational, Scientific and Cultural Organization (UNESCO); World Health Organization (WHO); International Bank for Reconstruction and Development (IBRD); International Finance Corporation (IFC); International Development Association (IDA); International Monetary Fund (IMF); International Civil Aviation Organization (ICAO); International Telecommunication Union (ITU); World Meteorological Organization (WMO); International Maritime Organization (IMO); World Intellectual Property Organization (WIPO); International Fund for Agricultural Development (IFAD); United Nations Industrial Development Organization (UNIDO); and the International Atomic Energy Agency (IAEA). See, International Court of Justice, *Organs and agencies authorized to request advisory opinions*, available at <http://www.icj-cij.org/en/organs-agencies-authorized> [last visited Jul. 31, 2018].

The authorized organs are: the Economic and Social Council (ECOSOC); the Trusteeship Council; and the Interim Committee of the General Assembly. Notably, the Secretary General is not so authorized. See 1992 U.N. Jurid. Y.B. 443, U.N. Doc. ST/LEG/SER.C/30.

activities.”⁶¹ Furthermore, in authorizing Specialized Agencies to submit requests for advisory opinions to the ICJ, the General Assembly has usually prohibited those agencies from submitting questions “concerning the mutual relationships between the organization and the United Nations or other specialized agencies” to the ICJ.⁶² No such restriction appears in the authorization of the organs, such as ECOSOC, to seek advisory opinions.

In sum, the interpretive practice of the Specialized Agencies is unlikely to be subjected to judicial oversight by the International Court, unless 1) the ICJ is called upon to render an advisory opinion by the General Assembly or Security Council *or* 2) the Specialized Agency that authored a given interpretation requests an advisory opinion that *both* arises within the scope of its activities *and* does not call upon the ICJ to pass upon the relationship between the requesting agency and other organs or agencies. This last restriction has a salutary effect, since it prevents Specialized Agencies from “requesting advisory opinions in the field in which most of the possible competence conflicts are likely to occur,”⁶³ i.e., between the various organs and agencies. Without this restriction, most interpretive decisions by the organs and Specialized Agencies would be unreviewable unless the interpreting agency itself were to request an advisory opinion.

Indeed, the interlocking restrictions of Article 96(2) and the authorizing resolutions between the General Assembly and the Specialized Agencies reduce the likelihood that the ICJ will be seized under its advisory jurisdiction to render a legal opinion regarding the interpretations by the Specialized Agencies of their own constituent instruments, unless the

⁶¹ U.N. Charter, Art. 96(2).

⁶² See, e.g., Draft Agreement between the United Nations and the World Health Organization, Art. X(2), U.N. Doc. A/348 (September 2, 1947); Draft Agreement between the United Nations and UNESCO, Art. XI(2), U.N. Doc. A/77 (September 30, 1946), available at http://www.unsceb.org/CEBPublicFiles/a_77.pdf [last visited Dec. 10, 2016] (notably, the General Assembly’s authorization of UNESCO gives ECOSOC the power to veto any request for an advisory opinion; the final agreement omits this provision); Agreement between the United Nations and IFAD, Art. XIII(2); General Assembly Resolution 32/107 (adopted on December 15 1977); Agreement Governing the Relationship Between the United Nations and the International Atomic Energy Agency, Art. X(1), INFCIRC/11 (November 14, 1957); see generally Goodrich & Hambro, *supra* note 57, at 490 & 629.

⁶³ Sulkowski, *supra* note 59, at 309.

agencies themselves (or the primary organs) request an advisory opinion of the ICJ.⁶⁴

It is useful to consider, first, the interpretive behavior of the Organs of the UN and Specialized Agencies; it is a broad phenomenon comprising numerous interpretive decisions often rendered quickly to meet the needs of the UN and dozens of its Specialized Agencies. Below are some major examples of interpretation.

A. General Assembly

1. Suspension of Membership: Article 5 of the Charter

According to Article 5 of the Charter⁶⁵, on the rights and privileges of membership of a State, membership in the UN may be suspended by the General Assembly on the recommendation of the Security Council. The first time that a question of suspension of a member State was raised was in connection with the membership of South Africa in UNCTAD in 1968.

UNCTAD was established by the General Assembly as a permanent subsidiary organ under Article 22 of the Charter encompassing all members of the UN, for the purpose of assisting the economic development of developing States through globalization. In 1968, many States in the Second Committee of the General Assembly called for the expulsion of South Africa from UNCTAD because of its apartheid policies. In a legal opinion requested by the Second Committee, the Secretariat of the UN cast doubt on the constitutionality of the action. It referred to the Charter as a multilateral treaty which sets up a legal order which defines rights and obligations of its members on the basis of the principle of sovereign equality (Article 2, paragraph 1) of the Charter. It also emphasized that the Charter was specific in matters dealing with curtailing membership which are addressed in Chapter II (Articles 5, 6 and 19) of the Charter. The Secretariat further stated that “had the drafters of the Charter intended to curtail membership rights in a manner other than those provided for in Articles 5, 6 and 19 of the Charter, they would

⁶⁴ To be sure, the ICJ may sometimes exercise its advisory jurisdiction to opine on another organ’s interpretation of its constitutive instruments, but the status of those advisory decisions should be approached with some care. The report will turn to the ICJ’s activity in this area below. *See infra* Ch. IV.

⁶⁵ Article 5 of the Charter reads: “A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council.”

have so specified in the Charter.”⁶⁶ It cautioned the General Assembly against going beyond the specific language of Article 5 of the Charter, which “would be dangerous in that its consequences would be unprecedented.”⁶⁷ The only other alternative for providing new grounds for suspension or expulsion of Member States, the Secretariat opined, was by an amendment to be effected under Article 108 of the Charter.⁶⁸

Eventually, the General Assembly called upon the Security Council to review the relationship between the UN and South Africa in the light of South Africa’s repeated violation of the principles of the Charter. The Security Council considered the question of immediate expulsion of South Africa under Article 6 of the Charter but was unable to adopt a resolution owing to the veto of three Permanent Members. Following the failure of the Security Council to adopt a resolution, the President of the General Assembly, ruled that the delegation of South Africa (whose credentials were denied) should be refused participation in the work of the General Assembly. The General Assembly adopted the President’s ruling, and South Africa did not participate in the General Assembly until 24 years later in 1994. Hence, the political issue was not addressed by an interpretation of Article 5 of the Charter, but through a procedural maneuver: denying the credentials of South Africa’s representatives and a Presidential ruling.

The issue of suspension of membership was raised again in 2011 in connection with Libya’s membership in the Human Rights Council, in the wake of Muammar Al-Qadhafi’s violent crackdown on anti-government protestors. The General Assembly agreed with the recommendation of the Human Rights Council and suspended Libya’s membership in the Human Rights Council. But this time the General Assembly’s action was compatible with the resolution establishing the Human Rights Council, which held that membership could be suspended for committing gross violations of human rights.⁶⁹ Hence suspension did not require Charter interpretation, because it was envisaged in the constituent instrument establishing the Organ.

⁶⁶ 1968 U.N. Jurid. Y.B 198, U.N. Doc. ST/LEG/SER.C/6.

⁶⁷ *Id.*

⁶⁸ *Id.*, at 200.

⁶⁹ G.A. Res. 60/251, § 8 (Apr. 3, 2006).

2. Expansion of the Competence of the General Assembly with regard to the maintenance of international peace and security: Uniting for Peace

Article 24 of the Charter assigns to the Security Council the “primary” responsibility for the maintenance of international peace and security. But just about five years after the conclusion of the Charter and four years after the establishment of the UN, the dynamics within the UN and its political context, provided an opportunity for the General Assembly to assign to itself certain responsibilities for the maintenance of international peace and security even in the face of a threat to and breach of the peace. This effected a constitutional shift in the Charter.

This constitutional modification was introduced not by amendment of the Charter, but by one Organ, the General Assembly, interpreting the Charter to ascribe to itself a competence which under the Charter belonged to another Organ. The General Assembly’s Charter interpretation was encouraged and consented to by four of the five Permanent Members of the Security Council and the majority of the members of the Organization, but opposed and objected to by one Permanent Member, the Soviet Union, and a few other Member States. Borrowing language from the conclusions of Committee II/2 of the San Francisco Conference, the interpretation of the Charter, on this issue, was “generally acceptable”; it was not unanimous. This interpretation is viewed by scholars as a constitutional shift between the General Assembly and the Security Council as designed under the Charter. It pushes the outer limits of what might be justified as “interpretation” under the terms of Articles 31 and 32 of the Vienna Convention on the Law of Treaties. But then there is Article 5 of the VCLT on the special status of the constituent instruments of international organizations and the extent to which it affects the application of Articles 31 and 32 on the principles for interpretation of treaties.

A review of the events that led the General Assembly to reconsider its powers under the Charter and the manner by which it interpreted the Charter might be helpful to provide some guidance on the question that is being considered by this Report.

Having emerged from the devastation of World War II and from the high hopes for the new Organization, the optimism of a new era of cooperation subsided almost immediately with the onset of the Cold War. The confrontation between East and West threatened to paralyze the functioning of the Security Council; the Soviet Union refused to attend the meetings of the Security Council and increasingly exercised the veto. The paralysis of the Security Council’s primary function under the Charter increased the profile of the General Assembly.

The item, “Uniting for Peace”, was placed on the agenda of the General Assembly by the United States at its fifth session in 1950. The United States together with Canada, France, the Philippines, Turkey, the United Kingdom and Uruguay submitted a draft resolution which subsequently was amended and adopted as General Assembly resolution 377(V) entitled “Uniting for Peace”.⁷⁰ Representatives supporting the Uniting for Peace resolution based themselves on their interpretation of Articles 10, 11, 12, 14 and 24 of the Charter. They argued that Articles 11 and 14 provided a general competence for the General Assembly to consider various matters on maintenance of international peace and security. They also saw a broad competence for the Assembly in Article 10 which authorized the Assembly to “discuss any questions or any matters within the scope of the present Charter” and to make recommendations. These representatives saw the limitation in Article 12(1) as one of timing, not substance. Article 12(1) provides that: “While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.”⁷¹ For these representatives, once the Security Council ceased its consideration of a situation, there was no barrier for the General Assembly to consider the question. The interpretation also extended to Article 24 of the Charter which confers on the Security Council “primary responsibility for the maintenance of international peace and security”. This language did not suggest in their view “exclusive competence” but rather that there must be a “secondary” responsibility which can be exercised when the Security Council fails to discharge its responsibility (The view that “primary competence” does not mean “exclusive competence” was later endorsed by the ICJ in the 1962 Advisory Opinion in *Certain Expenses*⁷², where the ICJ said “the responsibility conferred is ‘primary’, not exclusive.”⁷³). Hence, in the

⁷⁰ 1950 U.N.Y.B. 181, Sales No. 1951 I. 24. For a discussion on debates at the various stages of the development and adoption of the resolution see *Id.*, at 181-193.

⁷¹ U.N. Charter, Art. 12.

⁷² *Certain Expenses of the United Nations* (Article 17, paragraph 2, of the Charter), Advisory Opinion, 1962 I.C.J. Rep. 151, 163 (Jul. 20).

⁷³ The Court also said:

“... the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory. Article 18 deals with decisions of the General Assembly ‘on important questions’. These ‘decisions’ do indeed include certain recommendations, but others have dispositive force and effect.” *Id.*

view of 52 out of 59 States in the General Assembly and supported by the ICJ, “primary” means that there must be a “secondary” competence somewhere within the Organization, and that it must have been assigned to the General Assembly.

A review of the discussions during the consideration and adoption of the Uniting for Peace resolution makes clear that the representatives were well aware that their interpretation of various provisions of the Charter was a stretch beyond what the Charter had provided, or its drafters had intended or anticipated. The representative of Syria, while supporting the resolution, stated that the interpretation put forward “regarding the Assembly’s power to use armed force had not occurred to any delegation at San Francisco.”⁷⁴ The representative of Sweden put it in plain language:

During the past few years the General Assembly had tended to extend its competence beyond the limits indicated by the Charter. This was evident from resolution 39(I) of the Assembly concerning the Franco Spain and resolution 193 A (III) recommending an embargo on raw material to States neighboring Greece. The letter of the Charter had been exceeded in these decisions but this was a happy development; the Charter like all other constitutions must develop so that it would not become a dead letter.⁷⁵

The logic for the Uniting for Peace resolution is expressed in its preamble. Its paragraph eight states that the failure of the Security Council to perform its functions under the Charter, “does not relieve Member States of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and security”.⁷⁶ This paragraph separates the obligations of States under the Charter from the functions divided between various organizational structures within the UN. States remain obligated to comply with the Charter even if an Organ of the UN fails to discharge its function. It

The Court repeated the same idea in the Namibia Case:

“it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design.”

Legal Consequences for States of the Constituted Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, 50 (Jun. 21, 1971).

⁷⁴ 1950 U.N.Y.B., *supra* note 70, at 184. For a discussion on debates at the various stages of the development and adoption of the resolution, see *id.*, at 181-193.

⁷⁵ *Id.*

⁷⁶ G.A. Res. 377(v), Preamble, Uniting for Peace (Nov. 3, 1950).

further implies that the failure of an Organ of the UN does not relieve the obligations of the UN itself under the Charter for the maintenance of international peace and security. This approach seems to be based on the view that an organizational gap can be filled through interpretation even if the interpretation is not fully consistent with the letter of the Charter and finds no support in its legislative history.

The Uniting for Peace Resolution was adopted by 52 votes in favor, 5 against and 2 abstentions. For the Soviet Union, Byelorussian SSR, Ukrainian SSR, Czechoslovakia and Poland, the resolution was in conflict with several provisions of the Charter.⁷⁷

The constitutional shift in favor of the expansion of the competence of the General Assembly for the maintenance of international peace and security through the Uniting for Peace resolution has become part of the accepted law of the Organization. The resolution has been used many times either by direct invocation or by referring to the conditions under which the General Assembly may consider a question on the maintenance of international peace and security. The very first resolution adopted by the General Assembly under this constitutional shift occurred in 1951 in connection with the Korean situation. Without directly invoking the Uniting for Peace Resolution, the General Assembly adopted resolution 498 (V) declaring that the People's Republic of China, by giving direct assistance to those who were already committing aggression in Korea and engaging in hostile acts against the UN forces, had committed aggression.⁷⁸ The General Assembly also adopted a second resolution (500(V)) on "Additional measures to be employed to meet the aggression in Korea" calling for an embargo on shipment of war materiel to China and North Korea.⁷⁹

Under this constitutional shift, the General Assembly has dealt with a number of other issues relating to the maintenance of international peace and security, including the establishment of a peacekeeping force and also the request for an advisory opinion on a situation which was under consideration by the Security Council.⁸⁰ While the General Assembly's resolution 498 (V) declared that China had committed aggression, it has

⁷⁷ *Id.*, at 184. They also characterized it as illegal, harmful and dangerous, see at 191.

⁷⁸ For the discussion on this resolution see 1951 U.N.Y.B. 207-225, Sales No. 1951. 1. 30.

⁷⁹ G.A. Res. 500 (V), Additional measures to be employed to meet the aggression in Korea (May 18, 1951).

⁸⁰ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136 (Jul. 4, 2004).

not done anything comparable since then. Nor while theoretically permitted under the terms of the Uniting for Peace resolution, has it called for enforcement action. Resolution 500 (V), calling for an embargo on China and North Korea, was done in the form of recommendations, yet it was complied with by “some forty-five countries”.⁸¹ In 1962, the ICJ, in an advisory opinion, stated that the competence to call for enforcement action was exclusive to Security Council.⁸²

In the Suez Canal crisis, in 1956, the General Assembly, under the Uniting for Peace formula, adopted a resolution on 7 November 1956, at its First Emergency Session (1001-ES-1) opposing two Permanent Members of the Security Council, France and the United Kingdom, (which blocked the Security Council resolution on the subject)⁸³ in their support for the Israeli invasion of Egypt. The General Assembly established the first UN Emergency Force (UNEF1) in the Middle East and Israel, France and the United Kingdom withdrew.

While there was a general support for the establishment of UNEF1, there were discussions in the Assembly, again, on the constitutional basis of the establishment of a military force by the Assembly. The discussions did not directly question the legality of the Uniting for Peace Resolution, but focused on the conditions and type of military force that the Assembly can establish under these circumstances. The Report of the Secretary-General proposed two requirements, the *consent* of the host State(s) and the *objective* of the mission:

(9) ... While the General Assembly is enabled to *establish* the Force with the consent of those parties which contribute units to the Force, it could not request the Force to be *stationed or operate* on the territory of a given country without the consent of the Government of that country.

....

(10) ... There is an obvious difference between establishing the Force in order to secure the cessation of hostilities, with the withdrawal of forces. It follows that while the Force is different in that, as in many other

⁸¹ F. O. Wilcox, *How the United Nations Charter has Developed*, 296 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 8 (1954).

⁸² The Court said: “It is only the Security Council which can require enforcement by coercive action against and aggressor.” *Certain Expenses of the United Nations*, *supra* note 72, at 163.

⁸³ Because France and the United Kingdom blocked the consideration of the issue in the Security Council, the Council adopted Resolution 119 on 31 October 1956 calling for an emergency session of the General Assembly as provided for in the Uniting For Peace Resolution (GA/Res. 377 A (V) of 1950). For an account of the history of the events and detail constitutional analysis of this resolution see ROSALYN HIGGINS, *UNITED NATIONS PEACEKEEPING 1947-1967 DOCUMENTS AND COMMENTARY* 222-273 (1969).

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respects, from the observers of the United Nations Truce Supervision Organization, it is although para-military in nature, not a Force with military objectives.⁸⁴

The success of the Uniting for Peace model, in this instance, was primarily, as Michael Reisman observes, because both the United States and the Soviet Union “were joined in opposition to France and the United Kingdom and used the Assembly or, if one prefers, enabled it, by their support, to employ Uniting for Peace in ways that otherwise could not have been used.”⁸⁵ The General Assembly has not invoked the Uniting for Peace Resolution for the establishment of peace keeping operations since then.

Reporting on a year work of UNEF1, the Secretary-General elaborated again on the competence of the General Assembly to establish a peacekeeping force under the Uniting for Peace Resolution. The Secretary-General was at pains to explain the differences between the various degrees of binding character of the recommendatory nature of the General Assembly resolutions:

19. The Charter has given to the Security Council means of enforcement and the right to take decisions with mandatory effect. No such authority is given to the General Assembly, which can only recommend action to Member Governments, which, in turn, may follow the recommendations or disregard them. This is also true of recommendations adopted by the General Assembly within the framework of the "Uniting for Peace" resolution. However, under that resolution the General Assembly has certain rights otherwise reserved to the Security Council. Thus, it can, under that resolution, recommend collective measures. In this case, also, the recommendation is not compulsory.
20. It seems, in this context, appropriate to distinguish between recommendations which implement a Charter principle, which in itself is binding on Member States, and recommendations which, although adopted under the Charter, do not implement any such basic provision. A recommendation of the first kind would have behind it the force of the Charter, to which collective measures recommended by the General Assembly could add emphasis, without, however, changing the legal character of the recommendation. A decision on collective measures referring to a recommendation of the second kind, although likewise

⁸⁴ Second and Final Report of the Secretary-General on the Plan for an Emergency International United Nations Force Requested in the Resolution adopted by the General Assembly on 4 November 1956 (A/3276), U.N. Doc. A/3302 (Nov. 6, 1965).

⁸⁵ W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L. L., 83, 84, fn. 2 (1993).

formally retaining its legal character, would mean that the recommendation is recognized by the General Assembly as being of such significance to the efforts of the United Nations as to assimilate it to a recommendation expressing an obligation established by the Charter. If, in some case, collective measures under the "Uniting for Peace" resolution were to be considered, these and other important questions of principle would require attention; this may also be said of the effect of such steps which, while supporting efforts to achieve peaceful solutions, may perhaps, on the other hand, be introducing new elements of conflict.⁸⁶

3. The Principle of Self-determination: Articles 1, 55, 73 and 76 of the Charter

One of the purposes and principles of the Charter, referred to in Article 1(2), is the development of friendly relations among nations "based on respect for the principle of equal rights and self-determination of peoples". Articles 55, 73 and 76 of the Charter also refer to the principle of self-determination and some aspects of it. The references to the principle of self-determination are general with little guidance as to its content and its application.

Chapter XI of the Charter entitled "Declaration regarding Non-self-governing Territories" comprises two Articles (Articles 73-74) requesting Member States that had assumed responsibility for administration of these territories to transmit regularly to the Secretary-General, for information purposes, "subject to such limitations as security and constitutional considerations may require", statistical and other information of a technical nature relating to economic, social and educational conditions⁸⁷. Thus, the obligations of the administering authorities under the Charter are minimal. Also nothing in Chapter XI of the Charter specifies an Organ of the UN which has a supervisory competence to review the information submitted by governments or request additional information.

All this notwithstanding the General Assembly, through a process of continuous interpretation of Article 73, established itself as the primary organ with supervisory competence to examine the information supplied by the administering authorities, then modifying the types of information

⁸⁶ Question Concerned by the First Emergency Special Session of the General Assembly from 1 to 10 November 1956, Report of the Secretary-General in pursuance of the resolution of the General Assembly of 2 February 1957, (A/Res. 461), U.N. Doc. A/3527 (Feb. 11, 1957).

⁸⁷ U.N. Charter Art. 73(e).

requested. It then related that competence and function to the UN decolonization project.⁸⁸ As early as 1947, the General Assembly also established an *ad hoc* committee and then a special committee to examine the information submitted by administering authorities. Article 73(e) of the Charter requested information of a “technical nature relating to economic, social, and educational conditions in the territories”. As early as the mid-1950s, the General Assembly began to request political information as well, paving the way to a dynamic constitutional development of the Charter by the practice, starting in 1960, of the organs establishing the decolonization and self-determination program. All these developments were achieved by implicit interpretation of the Charter.

In 1980, the UN Secretariat noted the expanded role of the General Assembly in the determination of the scope of the principle of self-determination, its more detailed elaboration and the manner of its implementation:

2. It has been the role of the United Nations therefore not only to ensure respect for the right of self-determination as a basic principle of international law, but also to develop the subsidiary principles that govern lawful implementation of the right of self-determination. In this connexion, attention had to be given, among other aspects, to the question as to what legitimate forms implementation of self-determination can take.
3. The General Assembly has addressed this task at two different levels:
 - 1° at the general theoretical level by adopting authoritative more detailed restatements of the principle and 2° at the concrete level by dealing with actual individual cases of self-determination.⁸⁹

General Assembly Resolution 1514 (XV) of 1960, on the Declaration on the Granting of Independence to Colonial Countries and Peoples, elaborated the principle of self-determination. The Declaration relied heavily on the Universal Declaration of Human Rights which itself was adopted by the General Assembly in 1948. The first Preambular paragraph of the Declaration reaffirms “faith in fundamental human rights, in the dignity and worth of the human person, in equal rights of human person, in equal rights of men and women”.⁹⁰ Throughout the Declaration, reference to and reliance on human rights norms invoked in the Universal Declaration of Human Rights are found. In addition, *the objects and*

⁸⁸ For a more detailed explanation of this process see, Zacklin, *supra* note 2, at 188-195.

⁸⁹ Legal Opinion of the Secretariat of the United Nations, 1980 U.N. Jurid. Y.B. 182, U.N. Doc. ST/LEG/SER.C/18.

⁹⁰ G.A. Res. 1514(XV), Preamble § 1 (Dec. 14, 1960).

purposes of the Charter have been invoked for elaborating the content of the principle of self-determination. Colonization is considered incompatible with the Charter and the UN ideal of peace and cooperation.⁹¹ The last operative paragraph of the Declaration provides specifically that States shall faithfully and strictly observe the Universal Declaration of Human Rights.

In a second resolution adopted by the General Assembly at the same session, the General Assembly provided a more detailed elaboration on how self-determination should be implemented and what forms it could take. General Assembly Resolution 1541(XV) of 1960 on Principles which should Guide Members in Determining Whether or not an Obligation Exists to Transmit the Information called for Under Article 73(e) of the Charter, adopted twelve principles. Principle I referred to the *intention* of the drafters of the Charter as to what territories should come within the scope of Chapter XI of the Charter. Principle VI identified what forms self-determination may take, and Principles VII, VIII and IX state the conditions under which the option of free association or integration may be achieved.

In cases of difference among the views of Members as to whether certain territories fall within the scope of Chapter XI, the General Assembly made itself the arbiter. At the same 1960 session, questions were raised as to whether certain territories under the administration of Spain and Portugal fell within the scope of Chapter XI. The General Assembly made the decision in Resolution 1542(XV), listing those territories that fell within the scope of Chapter XI of the Charter. In 1961, the General Assembly also established the Special Committee of 17 to examine the application of the Declaration and make suggestions to the General Assembly.⁹²

Ten years after the adoption of General Assembly Resolution 1514 (XV), the General Assembly restated the principle of self-determination in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the UN : “The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by

⁹¹ *Id.*, at Preamble § 6 & Operative § 1.

⁹² G.A. Res. 1654(XVI) (Nov. 27, 1961).

a people constitute modes of implementing the right of self-determination by that people.”⁹³

From the practice of the UN it has now emerged that statehood is “the most common and thus normal form of self-determination and the General Assembly cannot be expected to accept any other form unless the peoples choosing a status different from independent statehood do so notwithstanding that independent statehood is a clearly available alternative.”⁹⁴

All these normative arrangements were achieved by the General Assembly assigning to itself the competence to continuously and implicitly interpret Articles 1, 55, 73 and 76 of the Charter. Such interpretations by the General Assembly were not questioned nor were they subject to any review or actual limitation.

B. Security Council

1. Residual Power of the Security Council: Article 24 of the Charter.

The question of the scope of Article 24 of the Charter⁹⁵ and the residual power of the Security Council became an issue only a year after the establishment of the UN in 1947 in the context of a question regarding the establishment and administration of the free territory of Trieste. In the protocol of one of the peace agreements between Italy and various victorious powers of World War II, to minimize tension between Italy and Yugoslavia it was agreed to establish a free and independent Trieste with mixed ethnic population. The Protocol also provided for the Security Council’s approval and guarantee of the independence and integrity of Trieste. The Council of Foreign Ministers (France, USSR, UK and USA) submitted the agreement to the Security Council requesting it to accept the responsibility. During the discussion in the Security Council, it was

⁹³ G.A. Res. 2625 (XXV), Annex (October 24, 1970).

⁹⁴ Legal Opinion of the Secretariat of the United Nations, *supra* note 89, at 183.

⁹⁵ Article 24 of the Charter reads: “In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.”

agreed that the Council was responsible for the maintenance of international peace and security, but questions were raised as to whether the Council needed *specific powers* under the Charter and whether all other States were obliged to comply with the decisions of the Security Council in such circumstances.

The representative of the Secretary-General made an oral statement in the Security Council on two legal questions on the interpretation of the Charter: whether (a) the Security Council had authority under the Charter to accept such a responsibility, and (b) whether all other States were obliged to accept and comply with the decisions of the Security Council with regard to the peace agreement. The representative of the Secretary-General relied on the broad power of the Security Council under Article 24 of the Charter for the maintenance of international peace and security which was distinct from specific powers and hence not limited to specific powers for the Security Council enumerated under Chapters VI, VII, VIII and XII of the Charter.⁹⁶ The representative of the Secretary-General

⁹⁶ Mr. Sobolev (Assistant Secretary-General) made the following statement: "I am directed by the Secretary-General to submit to the Security Council the following statement with regard to the legal issues raised in connection with the consideration by the Council of the three instruments relating to the Free Territory of Trieste. The legal questions raised are:

1. The authority of the Security Council to accept the responsibilities imposed by these instruments, and
2. The obligation of Members of the United Nations to accept and carry out the decisions of the Security Council pursuant to these instruments.

1. Authority of the Security Council

It has been suggested that it would be contrary to the Charter for the Security Council to accept the responsibilities proposed to be placed on it by the permanent Statute for the Free Territory of Trieste and the two related instruments. This position has been suggested on the ground that the powers of the Security Council are limited to the specific powers granted in Chapters VI, VII, VIII, and XII of the Charter, and that these specific powers do not vest the Council with sufficient authority to undertake the responsibilities imposed by the instruments in question.

In view of the importance of the issue raised, the Secretary-General has felt bound to make a statement which may throw light on the constitutional questions, presented. Paragraph 1 of Article 24 provides: "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf." The words, "primary responsibility for the maintenance of international peace and security", coupled with the phrase, "acts on their behalf", constitute a grant of power sufficiently wide to enable the Security Council to approve the documents in question and to assume the responsibilities arising therefrom.

Furthermore, the records of the San Francisco Conference demonstrate that the powers of the Council under Article 24 are not restricted to the specific grants of authority

supported his conclusion on the basis of the very conception of the Charter, the broad language of Article 24, the records of the San Francisco Conference and the rejection of a proposal specifically to limit the power of the Security Council to specific powers in Chapters VI-VIII and XII. He indicated that the only limitation on the powers of the Security Council for the maintenance of international peace and security was "the fundamental principles and purposes found in Chapter I of the Charter."⁹⁷ With respect to the obligation of other States to comply with the terms of the peace treaty for which the Security Council takes responsibility, he relied on the legislative history of the Charter in which

contained in Chapters VI, VII, VIII and XII. In particular, the Secretary-General wishes to invite attention to the discussion at the fourteenth meeting of Committee IIII at San Francisco, wherein it was clearly recognized by all the representatives that the Security Council was not restricted to the specific powers set forth in Chapters VI, VII, VIII and XII. (I have in mind document 597, Committee IIII/30.) It will be noted that this discussion concerned a proposed amendment to limit the obligation of Members to accept decisions of the Council solely to those decisions made under the specific powers. In the discussion, all the delegations which spoke, including both proponents and opponents of this amendment, recognized that the authority of the Council was not restricted to such specific powers. It was recognized in this discussion that the responsibility to maintain peace and security carried with it a power to discharge this responsibility. This power, it was noted, was not unlimited, but subject to the purposes and principles of the United Nations.

It is apparent that this discussion reflected a basic conception of the Charter, namely, that the Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter. [Emphasis added]

2. Obligation of the Members to accept and carry out the decisions of the Security Council

The question has been raised as to "what countries will be bound by the obligation to ensure the integrity and independence of the Free Territory". The answer to this is clear. Article 24 provides that in carrying out its duties, the Security Council acts in behalf of Members of the United Nations. Moreover, Article 25 expressly provides that "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".

The record at San Francisco also demonstrates that this paragraph applies to all the decisions of the Security Council. As indicated above, there was a proposal in Committee III/1 to limit this obligation solely to those decisions of the Council undertaken pursuant to the specific powers enumerated in Chapters VI, VII, VII and XII of the Charter. This amendment was put to a vote in the Committee and rejected (document 597, III/1/30). The rejection of this amendment is clear evidence that the obligation of the Members to carry out the decisions of the Security Council applies equally to decisions made under Article 24 and to the decisions made under the grant of specific powers."

U.N. SCOR, 91st mtg. at 44-45, U.N. Doc. S/PV.91 (Jan. 10, 1947).

⁹⁷ *Id.*, at 45.

a proposal for limiting the obligation of compliance by other States only to those Security Council decisions made under specific powers was rejected. He also referenced the language of Article 25 of the Charter in which States “agree to accept and carry out the decisions of the Security Council” which applies equally to those decisions made under Article 24.⁹⁸ The interpretation by the representative of the Secretary-General seems to have been accepted by Security Council members who voted in favor of the resolution with one exception: the representative of Australia insisted that the Security Council could not act under the general powers of Article 24 and abstained.⁹⁹

Oscar Schachter observes that Article 24 has not been interpreted to give the Council *carte blanche* nor has it been utilized to substitute for “more specific provisions of the Charter”.¹⁰⁰ Rather, it has been considered as providing the Security Council with a residual power on which to rely in situations involving international peace and security which do not fall within any of those specific powers provided to the Security Council under the Charter.¹⁰¹ He finds this a “justifiable constitutional development” in keeping with the basic principles of the Charter to act “effectively in the varied circumstances which might involve threats to the peace.”¹⁰²

2. Voting in the Security Council: Article 27 of the Charter

Article 27 of the Charter deals with voting in the Security Council. At the San Francisco Conference, there was manifest unease among negotiating States over the broad powers of the Permanent Members of the Council. As a way of curbing those powers and assuaging the concerns of those States, it was agreed that the veto power of the Permanent Members would not be exercised with respect to procedural questions. Article 27 reflects that understanding by making a distinction between procedural matters and all other matters.¹⁰³ For procedural matters Article 27(2) requires a simple

⁹⁸ *Id.*

⁹⁹ *See Id.*, at 56-8.

¹⁰⁰ O. Schachter, *The Development of International Law Through the Legal Opinions of the United Nations Secretariat*, 25 BRIT. Y.B. INT'L L. 91, 101 (1948).

¹⁰¹ Article 24 “has rather been regarded as a reservoir of authority, to be invoked only in those cases which, ..., relate to peace and security but which do not fall within the framework of the more detailed provisions of the Charter.” *Id.*

¹⁰² *Id.*

¹⁰³ U.N. Charter Art. 27 reads: “Each member of the Security Council shall have one vote. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of seven members.”

majority. Permanent Members have no right of veto. The Charter does not, however, define what constitutes “procedural matters”. In San Francisco, procedural matters were assumed to have a narrow scope, but the practice of the Security Council from the beginning led to the establishment of a broad understanding of procedural matters, narrowing the possibility for veto:

At San Francisco the great powers agreed upon a very narrow interpretation of “procedural” questions. For the most part these were the organizational matters referred to in Articles 28-32 of the Charter; the adoption of the rules of procedure of the Council; the selection of the President, the time and place of meetings, the establishment of subsidiary organs, etc. Beyond this point, argued the sponsoring governments in their statement of June 7, 1945, decisions of the Security Council might have “major political consequences,” and accordingly would require the unanimous vote of the permanent members.¹⁰⁴

3. Concurring Votes of the Permanent Members: Article 27(3) of the Charter

Article 27(3) of the Charter requires the “concurring votes of the permanent members” for the adoption of a decision of the Security Council on non-procedural matters. One of the first examples of interpretation of the Charter concerned the meaning of “concurring votes” of the Permanent Members. On its face, the language of Article 27(3) is clear. It reads in relevant part: “Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members ...” “Affirmative votes” is most plausibly the plain and ordinary meaning of “concurring votes”. Yet, as early as June 1946 two questions were raised in the Security Council on (a) whether “abstention” of a permanent member can be interpreted as a “concurring vote” and (b) whether absence of a permanent member from the Security Council would prevent the Security Council from making decisions. The questions provoked

Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.”

¹⁰⁴ Wilcox, *supra* note 81, at 6, citing United States Senate Committee on Foreign Relations, Subcommittee on the United Nations S. Doc. 87, “Review of the United Nations Charter: A Collection of Documents”, 562. *See also* Leo Gross, *The Double Veto and the Four-Power Statement on Voting in the Security Council*, 67 HARV. L. REV. 251 (1953).

considerable discussion among the Permanent Members and term members of the Security Council as well as the general membership of the UN in the General Assembly.

a) Abstention

As early as 1947, the Security Council confronted the question of a Permanent Member wishing to abstain from a vote on a decision dealing with a non-procedural matter. A consensus decision of the Permanent Members with the general agreement of the term members of the Security Council interpreted “abstention” not as voting against the decision, but rather as a “concurring” vote of the Permanent Member. On occasion, this interpretation was objected to by some term members of the Security Council, but no formal objection was ever made. What is striking is the expression of consent among the Permanent Members of the Security Council in a number of Presidential rulings with regard to this practice. Below are some examples which seem to demonstrate that the consent of the Permanent Members in respect of modifying but not increasing their own procedural rights under the Charter is viewed as an established practice which may not be reviewed.

i. Indonesian Question (1947)

On 1 August 1947, the question of hostilities between Indonesia and the Netherlands came before the Security Council. The Security Council adopted a resolution calling for the parties to cease hostilities and settle their dispute by arbitration or other peaceful means.¹⁰⁵ The United Kingdom and France abstained. The representative of the United Kingdom stated that while his government was not opposed to the draft resolution it was unable to vote in favor of it. The representative of France also expressed his government’s opposition to the draft resolution and the competence of the Security Council on the matter, but at the same time explained that because his government wished to facilitate the work of the Security Council, it abstained. At the 173rd meeting of the Security Council, the President of the Security Council (Syria) stated:

I think it is now jurisprudence in the Security Council -and the interpretation accepted for a long time - that an abstention is not considered a veto, and the concurrent votes of the permanent members mean the votes of the permanent members who participate in the voting.

¹⁰⁵ S.C. Res. 27 (Aug. 1, 1947).

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Those who abstain intentionally are not considered to have cast a veto.¹⁰⁶

ii. *United Nations Commission for India and Pakistan (1948)*

In connection with the adoption of a resolution on the establishment of the United Nations Commission for India and Pakistan in 1948 which was adopted with the abstention of a Permanent Member, the representative of Argentina expressed concern about the manner in which Article 27(3) of the Charter was modified. He said:

The resolution which was adopted at the [230th] meeting of 20 January 1948 ... did not obtain the concurring votes of the five permanent members of the Security Council.

This is a substantive decision and is therefore governed by Article 27, paragraph 3, of the Charter.

...

... I do not object to the permanent members of the Security Council foregoing the use of their privilege, if they consider it advisable, but if they do so, it should be done publicly.

Abstention is a way of concealing the veto, either because it is not desired to vote affirmatively, in order to avoid establishing a harmful precedent with regard to contrary decisions in the future, or because it is not desired to vote in the negative, in order not to appear to oppose a good decision, or in order to decrease the size of the target which the privilege offers to those who combat it.¹⁰⁷

Commenting on this statement, the representative of the United Kingdom said:

Every written constitution is always developed by the practice of the institutional organs.... Hitherto, as I understand it, the abstention by a permanent member of the Security Council in a vote on a matter of substance is, by practice and precedent in the Security Council, not considered a negative vote by that member, and I hope and trust that that understanding and practice will be adhered to.¹⁰⁸

¹⁰⁶ Repertoire of Practice of the Security Council, 1946-1951, Ch. IV, 174, *available at* www.un.org/en/sc/repertoire/46-51/46-51_04.pdf [last visited Dec 11, 2016]. In connection with consideration of the rules of procedure of the Security Council, the United States representative also stated: "In the opinion of the United States delegation, the Council has developed, during the past year, one practice in regard to the voting of the permanent members which appears to be of real importance. I refer to the practice of abstention by a permanent 'member in order to permit the will of the majority of the Council to prevail.'" *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

The representative of France also confirmed that France had always considered abstention as not constituting a negative vote.¹⁰⁹

iii. Former Japanese Mandate Islands (1949)

In March 1949, the Security Council adopted, with the abstention of a Permanent Member, a resolution with regard to the trusteeship agreement for the former Japanese mandate islands. After the adoption of the resolution, the representative of Egypt raised the following concern:

As far as interpretations and changes are concerned, whether in paragraph 3 of Article 27 or any other part of the Charter, I consider that we have to know whether jurisprudence for such matters, which might constitute a change in the Charter, can be a source of legislation in the United Nations. Can we through jurisprudence and through methods not stipulated in the proper paragraph of the Charter relating to its modification, change the Charter?¹¹⁰

iv. Admission of Israel (1949)

The decision of the Security Council to admit Israel to the UN included one vote against and one abstention. The abstention was from a Permanent Member. The President of the Security Council (Cuba) declared the resolution adopted invoking the practice of the Security Council that abstention from a Permanent Member did not render a resolution invalid.¹¹¹ The representatives of Argentina and Egypt took the view that the resolution was not adopted because it did not have the positive support of all Permanent Members. Argentina questioned the capacity of the Security Council to modify the Charter:

I wish, however, to go on record as stating that, contrary to the view held by some, if not by practically all the permanent members of the Council, this resolution has not been supported by the five permanent members of the Council as required in Article 27, paragraph 3, of the Charter. While the President has referred to an established principle I do not believe that the Security Council can establish principles to modify the Charter whenever it thinks fit.¹¹²

The representative of Egypt also expressed doubt “as to certain interpretations of the way in which Article 27, paragraph 3, of the UN Charter should be applied.”¹¹³ But the representative of the Soviet Union

¹⁰⁹ *Id.*

¹¹⁰ *Id.*, at 175.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

disagreed with Argentina and Egypt and confirmed the practice of the Council:

I would merely like to draw the Council's attention to the fact that, in accordance with the established practice of the Security Council, when a permanent member of the Council abstains from voting, such action is not interpreted in the way that some are now endeavouring to interpret it.¹¹⁴

v. *Situation in Lebanon and the establishment of UNIFIL (1978)*

In early 1970, the tension along the Israel-Lebanon border escalated after the relocation of the Palestinian armed elements from Jordan to Lebanon. Subsequently, in 1978, a commando attack against Israel, for which the Palestine Liberation Organization (PLO) claimed responsibility, resulted in many dead and wounded. In response, Israel invaded and occupied the entire southern part of Lebanon. Following a protest by Lebanon, the Security Council adopted resolutions 425 and 426 calling for the immediate withdrawal of Israel from Lebanon and the establishment of the UN Interim Force in Lebanon (UNIFIL). The Soviet Union abstained from both resolutions. No comment was made about whether the resolution had been adopted consistent with the Charter.

vi. *Expelling Iraq from Kuwait (1990)*

Following the invasion of Kuwait by Iraq in August 1990 and the seizure of Kuwait's oil fields and capital city, the Security Council adopted a series of resolutions demanding that Iraq withdraw from Kuwait. Pursuant to Iraq's noncompliance, and the further aggravation of the situation, the Security Council adopted resolution 678 in November 1990, which issued an ultimatum to Iraq to withdraw from Kuwait by 15 January 1991. While the resolution did not explicitly authorize the use of force, the language empowered Member States "to use all necessary means to uphold and implement Security Council resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area."¹¹⁵ China abstained from voting. There were no comments by any State about whether the resolution was adopted lawfully in view of China's abstention.

All of these incidents show that abstention of a permanent member of the Security Council is no longer viewed as a veto.

¹¹⁴ *Id.*

¹¹⁵ S.C. Res. 678, Operative § 2 (No. 29, 1990).

b) Absence of a Permanent Member

In the early years of the UN, the Soviet Union, whatever its intention, did not attend a number of meetings of the Security Council. The absence of the Soviet Union could have had the effect of paralyzing the work of the Council. This led to the Council's interpretation of Charter Article 27(3) in yet another way. Below are some examples.

i. The Iranian Question (1946)

Following World War II, and in connection with the commitment of the allied forces to remove their forces from Iran, the Soviet Union refused to withdraw the Red Army from the northern Iran. The issue was brought by Iran to the Security Council in March 1946. The Security Council considered the question in March, April and May 1946, but the Soviet Union did not attend the meetings of the Council. The Security Council, however, proceeded to consider and adopt resolutions in the USSR's absence. The Security Council characterized some of those decisions as procedural, thus not requiring the concurrent decision of the Permanent Members. The Soviet Union questioned the legality of the adopted resolutions, arguing that because of its non-participation in the discussions, the Security Council did not have the opportunity to hear the position of the other side of the conflict.¹¹⁶ In response to this complaint, the representative of the Netherlands replied:

If, as in this case, a party does not avail itself of the opportunity to be heard, this does not preclude the Council from taking a decision in matters where the vote of the Member in question is not absolutely required. The veto right of the great Powers is a limited right and therefore cannot be extended beyond the terms of the Charter by the great Power which is a party to a question before the Council, simply by absenting itself from the Council's deliberations.¹¹⁷

The issue of the effect of absence of a Permanent Member was joined. The representative of the Netherlands said that: "[i]t cannot be the intention of the Charter to give to any member of the Council, whether permanent or not, the power to prevent a resolution from being adopted by the simple expedient of absenting himself."¹¹⁸ The representative of Australia confirmed the views of the Netherlands and said:

It seems to us that if a member refuses to participate, or fails to participate, in the work of this Council, then for the time being he

¹¹⁶ *Supra* note 106, at 177.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

abandons the special powers which accrue to him as a member, and has no powers greater than those of any other Member of the United Nations.¹¹⁹

The representative of the United Kingdom, a Permanent Member, saw absence from the meeting as equivalent to an “abstention” from a vote:

I cannot see that there is really any difference between absence from this table or presence at the table and abstention from a vote. It seems to me that the general effect is the same. There is a difference in some ways; that is to say, the absence certainly does imply some sort of evasion of responsibility or obligations, and may in some cases reduce the authority of the Council, but I cannot see that it has any actual effect upon the ability of the Council to take a decision, any more than has sitting in a chair and abstaining from voting.¹²⁰

ii. *Establishment of the Commission for Conventional Armaments (1950)*

Again, in connection with the establishment of the Commission for Conventional Armaments, the Soviet Union refused to attend the meetings of the Security Council. The representative of the United States said that: “the absence of a permanent member from the table ... is an absence volunteered by the representative himself which, I think, the Council has clearly indicated it will not take as a deterrent to its proceeding in an orderly manner with its business.”¹²¹ This was a further confirmation of a practice forming a generally accepted interpretation of Charter Article 27(3).

iii. *Korean Crisis (1950)*

In 1950, the Soviet Union objected to the representation of China in the Security Council, because it did not recognize its government, and it refused to attend the meetings of the Security Council from 13 January 1950 until 1 August 1950. During that time the Council took a number of decisions, including with respect to the Korean crisis: determining the armed invasion of the Republic of Korea by North Korea “a breach of the peace”; recommending States to provide such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security; and establishing the Unified Command.¹²² By written communications to the Security Council, the

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

Soviet Union objected to the validity of the Security Council decisions in its absence. Those objections, however, were ignored by the Security Council. The Soviet Union finally returned to the Council on 1 August 1950, to preside as the President of the Security Council, and objected to this practice, as inconsistent with Charter Article 27:

The Security Council is not the Security Council when it fails to act in strict conformity with the Charter and, in particular, with Article 27 of the Charter; when it acts in the absence of two of the five permanent members [one being the representative of China that the Soviet Union did not recognize] of the Security Council whose participation and unanimity are an essential prerequisite for the legality of the Council's decisions.¹²³

This practice of voluntary abstention was not repeated either by the Soviet Union or any other permanent member.

c) Summary conclusions

During 1946-1954, sixty-four decisions of the Security Council on non-procedural issues were adopted by a vote in which one or more Permanent Members of the Security Council abstained. Abstention as tantamount to a "concurring" vote was also confirmed by Presidential ruling of the Security Council as well as by every Permanent Member of the Security Council.¹²⁴ This practice has continued and has become an accepted interpretation of the words "concurring vote" in Article 27(3).

The early practice of the Security Council also established that the absence of a permanent member was equivalent to abstention from voting and falls within the scope of "concurring vote" of Charter Article 27(3).¹²⁵ Since the absence of the Soviet Union in 1946 and 1950 from the Security Council, there has been no absence of a Permanent Member. Hence, it seems that the Permanent Members accepted the interpretation that their absence would constitute abstention and serve no benefit.

From as early as 1946, the Security Council has interpreted Article 27(3) in a manner that many would consider as a *de facto* modification of the Charter with respect to abstention by a Permanent Member and absence of a Permanent Member. In situations in which such decisions were taken there were discussions within the Security Council. The interpretation with respect to abstention of a Permanent Member has been

¹²³ *Id.*, at 178.

¹²⁴ Repertory of Practice of the United Nations Organs 1945-1954, Chap. V, Vol. 2, Article 27 of the Charter, § 46, available at <http://legal.un.org/repertory/art27.shtml>.

¹²⁵ *Id.*, § 49.

confirmed by all five Permanent Members as by Presidential rulings. The legality of this interpretation was, on occasion, in the earlier years of the practice of the Security Council, questioned by some term members of the Council as incompatible with the Charter.¹²⁶ The validity of the decisions so taken were not, however, challenged.¹²⁷

The ICJ, relying on the practice of the Security Council, stated in an *obiter dictum* that:

...the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. By absenting, a member does not signify its objection to the approval of what is being proposed; in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote. This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.¹²⁸

In a memorandum on this issue, the Secretariat of the UN echoed the generally held view that this practice amounts to a “*de facto*” modification of the Charter:

...[I]t is a widely held view among writers on the subject that this particular practice constitutes an authentic example of a *de facto* modification of a constitutive instrument, in this case the Charter of the United Nations, through the manner of its implementation by the Member States.¹²⁹

As regards the voluntary absence of a Permanent Member which only occurred in the early years of the Security Council and only by the Soviet Union, there were discussions in the Security Council, but it was the interpretation of the other four Permanent Members followed by Presidential ruling that established the practice of the Security Council over the objection of the Soviet Union.

¹²⁶ United Nations, Repertoire of Practice of the Security Council, 1946-1951, 174-175 (1952).

¹²⁷ *Id.*, at 166.

¹²⁸ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, 22 (Jun. 21).

¹²⁹ 1991 U.N. Jurid. Y.B. 291, U.N. Doc. ST/LEG/SER.C/29.

The practice of “abstention from a vote” of a Permanent Member in the Security Council has continued and the ensuing Council decisions have not been challenged. The voluntary “absence” of a Permanent Member, however, has not been repeated.

4. Legislative Power of the Security Council

Contrary to the General Assembly which can only make recommendations, the Security Council may make decisions which, by virtue of Articles 25 and 48(1) of the Charter, are binding on all members of the UN.¹³⁰ Thus, the Council is endowed with a potential for formal law-making competence within the UN system, in particular when it operates under Chapter VII. But there are “constraints”¹³¹ on the scope of competence of Security Council decision-making. The Security Council’s potential law-making competence is confined to a specific subject matter. Under Article 24 (1) of the Charter, the Security Council has the primary responsibility for the “maintenance of international peace and security”. That means the Security Council, under the terms of Article 24(1), must first determine that there is a threat to international peace and security.

During the first five decades of its operation, the Security Council, identified a particular conflict and made decisions with respect to that conflict for the sole purpose of targeting a particular delinquent State. There was no intention to establish “new rules of international law”.¹³² But in the late 1990s, the Security Council began to adopt resolutions with a much broader scope and not limited to a particular country or situation. Nor did the resolutions necessarily identify a situation as a threat to the peace.

For example, in 1999 the Security Council adopted resolution 1261 dealing with child soldiers, expressing concerns over the use of children as soldiers in armed conflict as well as its long-term consequences “for durable peace, security and development”.¹³³ The Security Council seemed to see its efforts as part of concerted “efforts to bring to an end

¹³⁰ U.N. Charter Art. 25 provides: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

Charter Article 48(1) provides:

“The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.”

¹³¹ Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT’L. L. 901, 901 (2002).

¹³² *Id.*, at 901-902.

¹³³ S.C. Res. 1261, Operative § 1 (Aug. 30, 1999).

the use of children as soldiers in violation of international law”.¹³⁴ The Security Council adopted similar resolutions with regard to international terrorism.¹³⁵ Again, the Security Council saw its effort as “contribut[ing], in accordance with the Charter of the UN, to the efforts to combat terrorism in all its forms”. In resolution 1269, while encouraging all States to become party to existing antiterrorism conventions, it called upon all States to take a series of measures, some of which were included in some of those conventions; thus, it obligated non-parties to comply with certain essential elements of those conventions.¹³⁶ The Council also adopted resolutions with regard to the improvement of the status of women.¹³⁷ The most prominent one is resolution 1325(2000), urging the participation of women and incorporation of gender perspectives in all UN peace and security efforts and calling on all parties to a conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, in situations of armed conflict. The resolution also includes a number of operational mandates, with implications for Member States and the entities of the UN system. Again, with no reference to any particular situation, the Security Council also adopted resolutions on protection of civilians in armed conflicts; condemning the deliberate targeting of civilians in situations of

¹³⁴ *Id.*, Preamble § 2.

¹³⁵ S.C. Res. 1269 (Oct. 19, 1999).

¹³⁶ *Id.*, at § 4, read:

“4. Calls upon all States to take, inter alia, in the context of such cooperation and coordination, appropriate steps to:

- cooperate with each other, particularly through bilateral and multilateral agreements and arrangements, to prevent and suppress terrorist acts, protect their nationals and other persons against terrorist attacks and bring to justice the perpetrators of such acts;
- prevent and suppress in their territories through all lawful means the preparation and financing of any acts of terrorism;
- deny those who plan, finance or commit terrorist acts safe havens by ensuring their apprehension and prosecution or extradition;
- take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not participated in terrorist acts;
- exchange information in accordance with international and domestic law, and cooperate on administrative and judicial matters in order to prevent the commission of terrorist acts.”

The Security Council also adopted a series of resolutions on combating terrorism such as S.C. Res. 1368 (Sep. 12, 2001); S.C. Res. 1624 (Sep. 14, 2005); S.C. Res. 2129 (Dec. 17, 2013).

¹³⁷ See e.g., Security Council Resolutions S.C. Res. 1325 (Oct. 31, 2000); S.C. Res. 1820 (Jun. 19, 2008); S.C. Res. 1889 (Oct. 5, 2009); S.C. Res. 1960 (Dec. 16, 2010); S.C. Res. 2106 (Jun. 24, 2013); S.C. Res. 2122 (Oct. 18, 2013); and S.C. Res. 2242 (Oct. 13, 2015).

armed conflict, calling on States to consider ratifying the major instruments of international humanitarian, human rights and refugee law;¹³⁸ and reiterating its willingness to respond, by all means at its disposal in accordance with the Charter, to situations of armed conflict where civilians are being targeted or humanitarian assistance to civilians is being deliberately obstructed.¹³⁹

Since it is the Security Council that determines what constitutes a threat to international peace and security, that “constraint” is subject to interpretation by the Security Council. Yet, the Security Council has been cautious in this respect. Where the Security Council does not intend to make its decisions compulsory, it implies that intention by using non-compulsory language in the operative part of its resolutions: “urging” States, “calling upon” States or other words with an unmistakable recommendatory tone.

When the Security Council acts under Chapter VII of the Charter, it usually, but not always, says so in the resolution; the language of the resolution is imperative and it is clear that its intention is that its decision is binding. When the language of such resolutions is couched in general terms going beyond a particular State or a situation, they move toward legislation.¹⁴⁰ The first Chapter VII resolution of this kind was adopted following the September 11, 2001 terrorist attack on New York, Pennsylvania and Washington DC. Security Council Resolution 1373¹⁴¹ is broad and comprehensive with detailed steps and strategies to combat international terrorism. Its long list of what all States have to do is not related to any particular State or situation and has no temporal limit, other than its last operative paragraph which provides that the Security Council “decides to remain seized of this matter.” Indeed, the Security Council remained seized of the matter and has adopted further resolutions under Chapter VII with monitoring and other specific directives. While drafted in the form of a resolution, the content of this resolution is akin to a legislative obligation¹⁴² binding all States without their specific consent.

¹³⁸ S.C. Res. 1265 (Sep. 17, 1999).

¹³⁹ S.C. Res. 1894, Operative § 4 (Nov. 11, 2009).

¹⁴⁰ See Szasz, *supra* note 131, at 902.

¹⁴¹ S.C. Res. 1373 (Sep. 28, 2001).

¹⁴² The evolution of the operation of the Security Council reveals that the optimism about the effectiveness of a limited membership organ with the major powers as the guardians of international peace and security evaporated shortly after the establishment of the United Nations. The veto power and the Cold War meant that the Security Council, from its establishment, was usually blocked from making any decisions. By the early

5. Measures Not Involving the Use of Armed Force to Give Effect to Security Council Decisions: Article 41 of the Charter

Article 41 of the Charter empowers the Security Council to decide on measures that are short of use of armed force to give effects to its decisions. It provides:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 41 does not use the term “sanction”, but lists a number of measures that are traditionally associated with sanctions of a coercive nature. Article 41 has also been used for a range of measures not associated with “sanctions” such as international criminal tribunals, compensation commissions, or other subsidiary bodies dealing with targeted sanctions against individuals. The Security Council’s interpretation of Article 41 and measures associated with it has a direct relationship with the expanded notion of “threat to the peace, breach of the peace, or act of aggression” in Article 39. With the broad interpretation of Article 39, Security Council sanctions regimes which in the past involved only inter-State conflict, now include internal State conflict and cover conflict resolution, non-proliferation, counterterrorism, democratization and the protection of civilians, including their human rights.¹⁴³ The Security Council’s expanded interpretation of Article 39 has not been objected to nor have there been objections with regard to measures employed under Article 41, other than the measures under targeted sanctions with regard to counter-terrorism which are discussed below.

1960s, the expansion of the General Assembly and the rise of the Non-Aligned Movement deprived the Council of much of its authority. The new members questioned the authority of the Council as opposed to the General Assembly. With the end of the Cold War, however, the institutional ability of the Security Council to exercise the considerable powers of Chapter VII increased. But the burst of optimism after the Cold War as to an effective role for the Security Council in dealing with international conflicts soon dissipated.

¹⁴³ SECURITY COUNCIL REPORT SPECIAL RESEARCH REPORT, UN SANCTIONS 3 (Nov. 2013), available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/special_research_report_sanctions_2013.pdf [last visited Jan. 24, 2017].

Article 41 was intended to address the shortcomings of Article 16 of the Covenant of the League of Nations (“Covenant”).¹⁴⁴ Contrary to Article 41 of the Charter, Article 16 of the Covenant provided a narrow range of measures, which may be taken against a State which commits an act of war. Three weaknesses in Article 16 of the Covenant have been identified:

Article 16 narrowly determined under what circumstances sanctions would be applied (i.e., interstate war), it specifically defined what form the sanctions would take (i.e., comprehensive diplomatic and economic), and it failed to centralise decision-making.¹⁴⁵

By contrast, Article 41 of the Charter does not specify the circumstance under which measures or sanctions may be undertaken, nor does it limit the forms such measures or sanctions may take. The flexibility which is embedded in the language of Article 41 has led the Security Council to take a broad range of measures short of use of armed force to implement its decisions.

Article 41 is in Chapter VII of the Charter and as early as the 1960s questions were raised with regard to the relationship between Article 41 and Article 39, i.e., whether the Security Council may invoke Article 41 and the measures provided in it before first invoking Article 39 and determining the existence of a threat to the peace, breach of the peace or act of aggression. The issue was raised in connection with the practice of

¹⁴⁴ League of Nations Covenant art.16, reads:

“Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.

The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimise the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League.

Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon.”

¹⁴⁵ SECURITY COUNCIL REPORT SPECIAL RESEARCH REPORT, *supra* note 143, at 1.

apartheid by the government of South Africa in 1964. The discussions in the Security Council supported the view that there must first be a determination of the existence of conditions under Article 39 before recommending measures under Article 41.¹⁴⁶

Questions were also raised in the 1990s as to whether the examples provided in the second half of Article 41 are exhaustive or illustrative. These measures were complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations. These questions related to the invasion of Kuwait by Iraq in 1990; the situation caused by the breakup of Yugoslavia starting in 1991; and the genocide in Rwanda in 1994.

a) Boundary Questions and the United Nations Compensation Commission

Following the invasion of Kuwait by Iraq on 2 August 1990, the Security Council adopted resolutions dealing with a number of issues. Acting under Chapter VII, the Council adopted resolution 660, on the same day of the invasion, condemning the Iraqi invasion, demanding immediate withdrawal of Iraqi forces and calling on Iraq and Kuwait to begin immediate negotiations for the resolution of their differences, namely their boundary issues. After almost eight months and the adoption of another 12 Security Council resolutions imposing also arms embargo and economic sanctions, Iraq still did not comply.

Eventually on 8 April 1991, acting again under Chapter VII, in paragraphs 2, 3 and 4 of Resolution 687 of 1991, the Security Council demanded that Iraq and Kuwait respect their international boundaries set out in their 1963 Agreed Minutes and registered with the United Nations; called on the Secretary-General to lend assistance to the two States to demarcate the boundary; and decided to guarantee the inviolability of that boundary. In paragraph 16 of the same Resolution, the Security Council held Iraq responsible under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign governments, legal and natural persons, as a result of Iraq's unlawful invasion and occupation of Kuwait.

¹⁴⁶ Repertory of Practice of United Nations Organs, Supp. No. 3 (1959-1966), Vol. 2, 228-229, §§ 24-32. A similar issue was also raised in connection with the situation in Southern Rhodesia. *Id.*, at 229-231, §§ 33-48.

The Secretary-General established the five-member United Nations Iraq-Kuwait Boundary Demarcation Commission whose final report (S/25822 and Add.1, dated 20 May 1993) was submitted to the Security Council. In Resolution 833 adopted on 27 May 1993, the Council, acting under Chapter VII, in paragraph 4 reaffirmed that the decisions of the Commission regarding the demarcation of the boundary are final.

Having declared Iraq responsible for all of this, the Security Council created a fund, under paragraph 18 of the same resolution for these claims. The Security Council then instructed the Secretary-General to develop recommendations for the fund to meet the requirements for the payment of such claims and the administration of the fund. The Security Council was not requesting the establishment of a judicial body, but an administrative body for the management of disposition of claims. The Secretary-General's proposal¹⁴⁷ followed the apparent scheme and recommended the establishment of the UN Compensation Commission, as a subsidiary organ of the Security Council, to pay compensation, as the Security Council had decided in Resolution 687. The work of the Compensation Commission, established by Security Council Resolution 692 however, was much closer to a claims commission with judicial functions, classifying, verifying and evaluating claims, making recommendations to the Governing Council for payment of compensation and deciding on measure of damages. Perfunctory allowance was made for representation by Iraq with respect to the Commission's decisions.¹⁴⁸

Three days after the adoption of resolution 687, the minister of foreign affairs of Iraq, by a letter addressed to the Secretary-General and the President of the Security Council, accepted the terms of the Security Council resolution and the responsibility for damage caused as a result of

¹⁴⁷ See Report of the Secretary-General pursuant to paragraph 19 of Security Council resolution 687 (1991), U.N. Doc. S/22559.

¹⁴⁸ David Caron & Brian Morris, *The UN Compensation Commission: Practical Justice, not Retribution*, 13 EUR. J. INT'L L. 183 (2002); M. Kazazi, *UN Compensation Commission: Learning from the UN's Experience in War Economic Reparation – The Case of Compensation for Losses Resulting from Iraq's Invasion and Occupation of Kuwait*, UNITED NATIONS, Feb. 7, 2012, available at <https://www.un.org/depts/dpa/qpal/docs/2012Cairo/p3%20mojtaba%20kazazi.ppt> [last visited Jan. 24, 2017]. Michael Reisman observes that the SC demarcation of a boundary, sequestering of natural resources of a State without its agreement and "to require it to pay a potentially large amount of damages, whose quantum and beneficiaries will be determined, in the ultimate instance, by the Council" make the political elite elsewhere uneasy. See Michael W. Reisman, *The Constitutional Crisis in the United Nations*, 87 AJIL 83, at 85 (1993).

Iraq's invasion and occupation of Kuwait. But the Iraqi minister's letter was subsequent to the adoption of the resolution and its expression of consent had no effect on the decision which the Council had taken.

While the Security Council Resolution 687 (1991) was adopted by a vote of 12 in favour, 1 against (Cuba) and 2 abstentions, the Council Members were aware of the uniqueness of the resolution and diving into territorial boundaries, a matter which the Council had never done before. A number of States who spoke before and after the adoption of the resolution confirmed that their vote in favour of the resolution was based on the very special circumstances of the situation. India's statement sums up the general view:

The authors of the draft have assured us, bilaterally as well as in the course of informal consultations, that they have put together the various elements of the resolution in the full understanding that the international community is dealing with a unique situation of which there has been no parallel since the establishment of the United Nations; hopefully, there will be none in the future. We have been urged to look at the resolution in the light of this uniqueness of the situation.

....

It goes without saying that my delegation will never support any decision whereby the Council would impose arbitrarily a boundary line between two countries. Boundaries are an extremely sensitive issue and must be settled by the countries freely in the exercise of their sovereignty. Any other course would only lay the groundwork for potential trouble in future. In this particular case we find that the boundary between Iraq and Kuwait was agreed upon by the highest authorities of the respective countries as two fully independent and sovereign States. Furthermore, they both took the precaution to register their agreement with the United Nations. Thus, the Council is not engaging itself in establishing any new boundary between Iraq and Kuwait. What it is doing is to recognize that such a boundary, agreed to by the two countries in the exercise of their full sovereignty, exists and to call upon them to respect its inviolability.¹⁴⁹

The five Permanent Members were clear that the Security Council Resolution was not delimiting boundaries between Iraq and Kuwait, but simply demarcating the boundaries on which they both had agreed and signed in the Agreed Minute of 1963 registered with the United Nations. The United States made clear that the resolution was to restore

¹⁴⁹ U.N. SCOR, 2981st mtg. at 72-78, U.N. Doc. PV.2981 (Apr. 3, 1991).

international peace and security and was not intended to expand the role of the Security Council:

The resolution focuses on the bases for restoration of peace and security to the region. Foremost among these is respect for the border. The Council notes that Iraq and Kuwait signed Agreed Minutes in 1963 regarding their mutual border. Kuwait registered this Agreement with the United Nations in accordance with Article 102 of the Charter and it was published in the United Nations Treaty Series.

Iraq never protested the Agreement or its registration with the United Nations. But in August 1990 Iraq invaded, occupied and attempted to annex Kuwait. Through the Council, the international community has rejected Iraq's actions. And through the Council, the international community has ejected Iraq from Kuwait. Our task now, consistent with our responsibilities under Chapter VII, is to establish peace in such a way that Iraq never again threatens Kuwait's sovereignty and integrity. For that reason, the resolution demands that Iraq and Kuwait respect their international boundary as it was agreed upon in 1963...

The circumstances that are before us are unique in the history of the United Nations, and this resolution is tailored exclusively to these circumstances. By this action, the Security Council has only acted to restore international peace in a case where one State violated another's boundary and attempted to destroy that State's very existence by force. Certainly, *the United States does not seek, nor will it support, a new role for the Security Council as the body that determines international boundaries.* Border disputes are issues to be negotiated directly between States or resolved through other pacific means of settlement available, as set out in Chapter VII of the Charter.¹⁵⁰

b) Establishment of International Tribunals

i. Establishment of the International Criminal Tribunal for the former Yugoslavia

Following the establishment of the Commission of Experts to examine and analyze the evidence of the commission of grave breaches of the Geneva Conventions and other violations of international humanitarian law in the territory of the former Yugoslavia, the Security Council, acting under Chapter VII of the Charter, adopted resolution 827(1993) establishing a criminal tribunal. While, in a practical sense, the UN Compensation Commission performed judicial functions, it was, as noted, viewed as an administrative organ. In the case of Security Council resolution 827 (1993), it was the first time that the Security Council had

¹⁵⁰ *Id.*, at 83-6 [emphasis added].

established a tribunal. Prior to the adoption of the resolution, the Security Council asked the Secretary-General to provide a report on all aspects of such a criminal court and the modes of its establishment.¹⁵¹ The Secretary-General's report noted that the most appropriate manner for the establishment of an international criminal tribunal was by means of the conclusion of a treaty. It also recognized suggestions by governments that it would be appropriate to involve the General Assembly, which is the most representative organ of the international community, in the drafting and review of the statute of the tribunal. However, bearing in mind the time pressure, the Secretary-General did not see any constitutional impediment for the Security Council to establish such a court acting under Chapter VII of the Charter. In the view of the Secretary-General: "[s]uch a decision would constitute a measure to maintain or restore international peace and security, following the requisite determination of the existence of a threat to the peace, breach of the peace or act of aggression."¹⁵²

Resolution 827(1993) was adopted unanimously. During the debate in connection with the adoption of the resolution, State representatives noted the exceptional circumstances of the situation in the former Yugoslavia which constituted a threat to international peace and security. The creation of the Tribunal was viewed as an exceptional step to deal with an exceptional circumstance.¹⁵³ The fact that the Security Council had also taken a step, by an earlier resolution, and had gathered evidence that serious war crimes had been committed, made the establishment of a tribunal a logical step to address the problem. The representative of Japan thought that while the establishment of a tribunal by the Security Council under Chapter VII was exceptional, it was not outside the bounds of the competence of the Security Council.¹⁵⁴ China, however, while it supported the establishment of the Tribunal, viewed the situation as an

¹⁵¹ S.C. Res. 808 (Feb. 22, 1993).

¹⁵² Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704 (1993).

¹⁵³ See statement by representatives of the United Kingdom, U.N. SCOR, 3270 mtg. at 18, U.N. Doc. S/PV.3217 (May 25, 1993); of Hungary, *Id.*, at 20; of Japan, *Id.*, at 26; of China, *Id.*, at 33; and of Brazil, *Id.*, at 34.

¹⁵⁴ Japan stated: "The Security Council is obliged to take the exceptional measures it is taking today. Yet it cannot be argued that these measures lie outside the Council's jurisdiction, for the very complexity of the threat and the gravity of the crisis have made the Council's action inevitable. On the contrary, it may be argued that, without a comprehensive strategy on the part of the international community, the complex situation in the former Yugoslavia cannot be properly addressed." *Id.*, at 26.

exception, with uneasiness about the establishment of international tribunals through Charter Chapter VII. In China's view, international tribunals could only be established by means of a treaty negotiated between States. China saw that the establishment of international tribunal through Chapter VII was an *ad hoc* arrangement for exceptional circumstances.¹⁵⁵ But China did not question the competence of the Security Council under Chapter VII to establish a tribunal. By contrast, Brazil, while supporting the resolution establishing the Tribunal, expressed uncertainty about the constitutional authority of the Security Council to do so and wished that there would have been more time to examine the issue.¹⁵⁶

¹⁵⁵ China stated: "This political position of ours, however, should not be construed as our endorsement of the legal approach involved. We have always held that, to avoid setting any precedent for abusing Chapter VII of the Charter, a prudent attitude should be adopted with regard to the establishment of an international tribunal by means of Security Council resolutions under Chapter VII. It is the consistent position of the Chinese delegation that an international tribunal should be established by concluding a treaty so as to provide a solid legal foundation for it and ensure its effective functioning. Furthermore, the Statute of the International Tribunal just adopted is a legal instrument with the attributes of an international treaty involving complicated legal and financial questions. It ought to become effective only after having been negotiated and concluded by sovereign States and ratified by their national legislative organs in accordance with domestic laws.

Therefore, to adopt by a Security Council resolution the Statute of the International Tribunal which gives the Tribunal both preferential and exclusive jurisdiction is not in compliance with the principle of State judicial sovereignty. The adoption of the Statute of the International Tribunal by the Security Council through a resolution by invoking Chapter VII means that United Nations Member States must implement it to fulfil their obligations provided for in the Charter. This will bring many problems and difficulties both in theory and in practice. For this reason, China has consistently maintained its reservations.

In short, the Chinese delegation emphasizes that the International Tribunal established in the current manner can only be an *ad hoc* arrangement suited only to the special circumstances of the former Yugoslavia and shall not constitute any precedent."

Id., at 33-34.

¹⁵⁶ Brazil stated: "Brazil examined with great care the proposals for the establishment, by the Security Council itself, of such an international tribunal. In that consideration, we found that such proposals posed intricate and not unimportant legal difficulties, many of which were not resolved to our satisfaction.

Given the legal difficulties involved, which in the normal course of events would have required much more extensive study and deliberation and could have prevented us from supporting the initiative, it was only the consideration of the unique and exceptionally serious circumstances in the former Yugoslavia that determined the vote we cast on the resolution we have just adopted. Our positive vote is to be understood as a political expression of our condemnation of the crimes committed in the former Yugoslavia and

ii. *Establishment of the International Criminal Tribunal for Rwanda*

Following the 1994 genocide in Rwanda, the government of Rwanda requested the Security Council, among others, to establish an international tribunal to try those who committed the crimes.¹⁵⁷ In response to that request and in view of the fact that such a tribunal was already established for Yugoslavia, the Security Council adopted resolution 955(1994) establishing yet another international criminal tribunal to prosecute persons responsible for genocide and other serious violations of international humanitarian law in the territory of Rwanda. Some delegations referred to the fact of the request by Rwanda for the establishment of such a tribunal as if they found it important in supporting the establishment of such a tribunal.¹⁵⁸ China, this time abstained, expressing its reservations about the Security Council establishing international tribunals “at will” under Chapter VII of the Charter.¹⁵⁹ Brazil expressed similar concerns, but supported the resolution.¹⁶⁰

of our heartfelt wish to contribute to bringing to justice, with the urgency that is imposed on us by the facts, all persons responsible for such acts. It should not be construed as an overall endorsement of legal formulas involved in the foundation or in the Statute of the International Tribunal.

We would certainly have preferred that an initiative bearing such far-reaching political and legal implications had received a much deeper examination in a context that allowed a broader participation by all States Members of the United Nations. To that end, we believe it would have been appropriate for this matter also to be brought to the attention of the General Assembly. ...

The option of establishing the Tribunal exclusively through a resolution of the Security Council, which we did not favour, leaves unresolved a number of serious legal issues relating to the powers and competences attributed to the Council by the United Nations Charter. That fact will not and should not limit the effectiveness of the work of the International Tribunal. It does limit, however, in our understanding, the conclusions that could be drawn from the adoption of this resolution as regards the legal and political framework for the work of the Security Council.”

Id., at 35-37.

¹⁵⁷ Permanent Rep. of Rwanda to the U.N., Letter dated 28 September 1994 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council, U.N. Doc. S/1994/1115 (Sep. 29, 1994).

¹⁵⁸ For debate *see* U.N. SCOR, 3453 mtg., U.N. Doc. S/PV. 3453 (Nov. 8, 1994).

¹⁵⁹ China stated: “At present people still have doubts and worries about the way in which an international tribunal is established by a Security Council resolution under Chapter VII of the United Nations Charter, and careful studies are still being carried out. In principle, China is not in favour of invoking at will Chapter VII of the Charter to establish an international tribunal through the adoption of a Security Council resolution.

c) Establishment of Interim and Transitional Administrations

The Security Council has established three administrative authorities for territories under illegal occupation, to facilitate their progress toward independence and self-government. Not all of these administrative authorities have been established under Chapter VII of the Charter. The establishment of these administrative authorities, while novel, has not raised constitutional questions.

For Namibia, the Security Council, not acting under Chapter VII, adopted resolution 435(1978), to ensure the early independence of Namibia through free elections under the supervision and control of the UN.

The civil war in Serbia with regard to Kosovo prompted the Security Council, this time acting under Chapter VII, to adopt resolution 1244(1999). It established “an international civil presence in Kosovo in order to provide an interim administration for Kosovo ... which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.”

That position, which we stated in the Council last year during the deliberations on the establishment of an International Tribunal for the Former Yugoslavia, remains unchanged.

It was for the purpose of upholding justice and bringing to justice as soon as possible those who are responsible for crimes that seriously violate international humanitarian law — and especially on the basis of the urgent desire of the Government of Rwanda, the current unique circumstances in that country and the strong demand of the African countries and the international community — that China was originally prepared to give positive consideration to the Security Council draft resolution and the draft statute on the establishment of the International Tribunal for Rwanda.”

Id., at 11.

¹⁶⁰ Brazil stated: “As we stated in the case of the Tribunal for the former Yugoslavia, Brazil is not convinced that the competence to establish and/or to exercise an international criminal jurisdiction is among the constitutional powers of the Security Council; or that the option of resorting to a resolution of the Security Council is the most appropriate method for such a purpose.

The authority of the Security Council is not self-constituted. It originates from the delegation of powers conferred upon it by the whole membership of the Organization under Article 24 (1) of the Charter. For that very reason, the Council’s powers and responsibilities under the Charter should be strictly construed, and cannot be created, recreated or reinterpreted by decisions of the Council itself.”

Id., at 9.

Also, in 1999, the Security Council, again acting under Chapter VII, adopted resolution 1272(1999), establishing the UN Transitional Administration for East Timor (UNTAET) to assist East Timor to achieve independence. UNTAET had legislative and executive powers and acted similar to a government.

d) Targeted Sanctions

As early as 1963 the Security Council imposed sanctions on States for failing to comply with its decisions under Chapter VII of the Charter. The types of sanctions imposed have evolved from voluntary to compulsory¹⁶¹ and from more comprehensive sanctions during the Cold War to targeted sanctions on States and non-State entities, following the Cold War, after 1991.

Targeted sanctions of the Security Council may be grouped into five types: diplomatic, travel bans, asset freezes, arms embargoes, and commodity interdictions. The Security Council normally establishes sanctions committees for each sanction regime.¹⁶² Sanctions committees

¹⁶¹ The Security Council first imposed voluntary sanctions on South Africa in 1963 and Southern Rhodesia in 1965, for their apartheid and racial discrimination policies. But, not all States voluntarily complied with the sanction regime, the Security Council then imposed mandatory sanctions on Rhodesia in S.C. Res. 253 (May 29, 1968) and on South Africa in S.C. Res. 418 (Nov. 4, 1977).

¹⁶² Governments and non-governmental institutions have conducted a number of studies on ways in which the design of Security Council targeted sanctions could be improved to make them more effective and to minimize unanticipated consequences. They include: the Bonn-Berlin Process which resulted in the 2001 report, *DESIGN AND IMPLEMENTATION OF ARMS EMBARGOES AND TRAVEL AND AVIATION RELATED SANCTIONS* (Michael Brzoska ed., 2011), available at http://www.watsoninstitute.org/tfs/CD/booklet_sanctions.pdf [last visited Jan. 25, 2017]; the Interlaken Process resulting in the 2001 report, *TARGETED FINANCIAL SANCTIONS: A MANUAL FOR DESIGN AND IMPLEMENTATION* (2001), available at <http://www.watsoninstitute.org/pub/TFS.pdf> [last visited Jan. 25, 2017]; and the Stockholm Process resulting in the 2003 report, *MAKING TARGETED SANCTIONS EFFECTIVE: GUIDELINES FOR THE IMPLEMENTATION OF UN POLICY OPTIONS* (Peter Wallensteen et al., ed., 2003), available at http://pcr.uu.se/digitalAssets/173/c_173853-l_1-k_final_report_complete.pdf [last visited Jan. 25, 2017]. These reports were the basis for a series of reports prepared by the Informal Working Group on General Issues of Sanctions, a subsidiary body of the Security Council (Martin Belinga-Eboutou, Letter dated 19 December 2003 from the Permanent Representative of Cameroon to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2003/1197 (Jan. 22, 2004), U.N. President of the S.C., Letter dated 17 December 2004 from the Chairman of the Informal Working Group of the Security Council on General Issues of Sanctions addressed to the President of the Security Council, U.N. Doc. S/2004/979 (Dec. 21, 2004) and U.N. President of the S.C., Letter dated 22 December 2005 from the Chairman of the Security Council Informal Working Group on General Issues of Sanctions addressed to the President of the Security Council, U.N. Doc. S/2005/842 (Dec.

are subsidiary organs of the Security Council established under Article 29 of the Charter for the purposes of administering sanctions designed by the Security Council. Sanctions committees establish a panel or group of experts to assist them for monitoring and reporting purposes. The institutional process for listing or delisting targets for targeted sanctions also increased. The targets are either listed in the resolution of the Security Council or decided by the sanctions committees based on the criteria in the relevant Security Council resolution.

Usually States propose candidates for listing and if there is no objection within the sanctions committee within a designated time, the candidate is included in the list. While the process of imposing targeted sanctions was generally accepted by States, in the last several years the process of delisting or removal of specific individuals from the list has become a source of concern for States and non-State entities. Indeed, a process for delisting was even established following pressure from several States, the Secretary-General, the High Commissioner for Human Rights and some non-governmental organizations. The concerns related to due process issues with respect to targeted sanctions imposed by resolution 1267 on 15 October 1999 with regard to individuals and entities associated with Al-Qaida, Osama bin Laden and the Taliban wherever located.

Although this sanction regime has since been reaffirmed and modified by a number of other resolutions, concerns expressed by States and other international actors including within the UN system itself, have led the Security Council to adjust the targeted sanctions regime. In 2009, the Security Council established the Office of the Ombudsperson to review delisting requests with respect to targeted sanctions for Al-Qaida (Security Council resolution 1904 of 17 December 2009). The Security Council, pressed again to modify the delisting process “recognizing the challenges, both legal and otherwise, to the measures implemented by

29, 2005)) and a final report on 18 December 2006 (U.N. President of the S.C., Letter dated 18 December 2006 from the Chairman of the Informal Working Group of the Security Council on General Issues of Sanctions addressed to the President of the Security Council, U.N. Doc. S/2006/997 (Dec. 22, 2006)). A study was also prepared by the Watson Institute of Brown University, *STRENGTHENING TARGETED SANCTIONS THROUGH FAIR AND CLEAR PROCEDURES* (2006), *available at* http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf [last visited Jan. 25, 2017], which was transmitted to the General Assembly and the Security Council on 19 May 2006 (Permanent Rep. of Germany to the U.N. et al., Identical letters dated 19 May 2006 from the Permanent Representatives of Germany, Sweden and Switzerland to the United Nations addressed to the President of the General Assembly and the President of the Security Council, U.N. Doc. A/60/887-S/2006/331 (Jun. 14, 2006)).

Member States”,¹⁶³ made the process of listing more transparent and expanded the power of the Ombudsperson. The resolution requests the States which provide a name for inclusion in the list to provide “a detailed statement of the case, and ... that the statement of the case shall be releasable, upon request, except for the parts a Member State identifies as being confidential to the Committee and may be used to develop the narrative summary of reasons for listing”.¹⁶⁴ To inform the sanctions committee of any possible domestic law obstacles, the resolution also encourages States and relevant international organizations “to inform the Committee of any relevant court decisions and proceedings so that the Committee can consider them when it reviews a corresponding listing or updates a narrative summary of reasons for listing.”¹⁶⁵ The power of the Ombudsperson was also expanded. Under this resolution, the Ombudsperson’s recommendation for delisting is final unless the Committee decides otherwise, by consensus, in which case the Security Council will decide the question itself at the request of a Committee member.¹⁶⁶

Sanctions, short of the use of armed force, are among the most common measures taken by the Security Council to implement its decisions under Chapter VII. The most common sanctions were comprehensive measures imposed on States and later against groups, individual human beings, and corporate entities. The due process concerns expressed against the recent targeted sanctions regime, did not challenge the competence of the Security Council under Chapter VII to impose targeted sanctions, but was an expression of a common expectation that such targeted regimes should take account of human rights norms and due process issues, established under the auspices of the UN itself.

C. Other Practices of Interpretation of the Charter Within the United Nations

1. Power of the General Assembly to Make Recommendations on Issues on which the Security Council is seized: Article 12 of the Charter

In accordance with Article 12(1) of the Charter, the General Assembly shall not make any recommendations with respect to a dispute or situation under consideration by the Security Council unless the Security Council

¹⁶³ S.C. Res. 1989, preambular § 11 (Jun. 17, 2011).

¹⁶⁴ *Id.*, operative § 13.

¹⁶⁵ *Id.*, operative § 17.

¹⁶⁶ *Id.*, operative § 23.

so requests.¹⁶⁷ In the earlier years of the UN, many items were considered by both the General Assembly and the Security Council sequentially but not simultaneously.¹⁶⁸ Later, there have been situations in which both the General Assembly and the Security Council considered the same situations concurrently and adopted substantive resolutions without reference to Article 12(1) of the Charter.¹⁶⁹ The General Assembly also appears to have interpreted the words “is exercising” as meaning “is exercising at this moment”¹⁷⁰; and has made recommendations on matters of which the Security Council was seized but that were not under its active consideration at the time the General Assembly adopted its resolution.

There appears to be only one instance in which the Security Council rejected the request by a member State, the Soviet Union, to include an item on its agenda which was also before the General Assembly on the basis of Article 12(1) of the Charter. It involved the 1956 request by the Soviet Union to inscribe an item entitled “Non-compliance by the United Kingdom, France and Israel with the decisions of the emergency special

¹⁶⁷ U.N. Charter, Art. 12 provides: “While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.”

¹⁶⁸ The following are some examples of situations considered first by the Security Council and then later by the General Assembly: The Indonesian question submitted by Australia first in 1947; the complaints by Tunisia against France submitted in 1961; and the question of Angola submitted in 1961. The following is an example of a question that was first considered by the Assembly and later by the Security Council: The Palestine question was originally submitted to the General Assembly and the Assembly by its resolution 181(II) recommended the adoption and implementation of a plan of partition with economic union and requested the Council to take the necessary measures provided for in the plan and to consider if the circumstances during the transition period required such considerations, whether the situation in Palestine constituted a threat to the peace. 1964 U.N. Jurid. Y.B. 228-237, U.N. Doc. ST/LEG/SER.C/2.

¹⁶⁹ Some examples include: the situation in the Congo, 1960-1961, the situation of Angola, 1961-1962; the apartheid question, 1960-1963; the question relating to the territories under Portuguese administration, 1962-1963; the question of Southern Rhodesia, 1962-1963. *Id.*

¹⁷⁰ 1968 U.N. Jurid. Y.B., *supra* note 66, at 185.

session of the General Assembly of the UN of 2 November 1956 and immediate steps to halt the aggression of the aforesaid States against Egypt.”¹⁷¹ The request was rejected by 3 votes in favor, 4 against and 4 abstentions.¹⁷²

A 1964 Secretariat review of the practice with regard to Article 12(1) concludes that since 1960 there have been at least six cases in which the General Assembly appeared to have departed from the text of Article 12. In “none of these cases, however, did a Member object to the recommendation on the ground of Article 12.”¹⁷³ The Secretariat also concludes that “[a]lthough Article 12 has not been invoked in these cases, it would be difficult to maintain that it is legally no longer in effect.”¹⁷⁴

The Secretariat of the UN considered the question again in 1991. This time it invoked the “purpose” of Article 12(1) as safeguarding “the Security Council’s primary responsibility for the maintenance of international peace and security.”¹⁷⁵ It further observed:

One particular purpose of Article 12, paragraph 1, is to avoid conflicting actions between the General Assembly and the Security Council. The article continues to serve this purpose and remains applicable to avoid the situation of the two organs adopting contemporaneous recommendations which are contradictory or at cross-purposes. This aspect is reflected in the statement, found in a 1968 legal opinion on Article 12, that the Assembly in practice has interpreted the words “is exercising” in paragraph 1 of Article 12 as meaning “is exercising *at this moment*.”¹⁷⁶

2. The Right to Self-Defence for United Nations Peacekeeping Forces: Article 51 of the Charter

In its practice of peacekeeping and peace enforcement operations, the UN has recognized the applicability of Article 51 of the Charter on the use of force “in self-defence [as] an inherent right of the United Nations forces exercised to preserve a collective and individual defence.”¹⁷⁷ The development of the scope and the beneficiaries of the right to self-defence has proceeded in general international law, while the Security Council has proceeded to adjust it with respect to its peacekeepers. For example,

¹⁷¹ 1964 U.N. Jurid. Y.B., *supra* note 168, at 233.

¹⁷² *Id.*

¹⁷³ *Id.*, at 237.

¹⁷⁴ *Id.*

¹⁷⁵ 1991 U.N. Jurid. Y.B., *supra* note 129, at 289.

¹⁷⁶ *Id.*, at 290.

¹⁷⁷ 1993 U.N. Jurid. Y.B. 372, U.N. Doc. ST/LEG/SER.C/31.

in a 1993 internal memorandum to the Senior Political Advisor to the Secretary-General, the UN Office of Legal Affairs stated that “the use of force in self-defence is not limitless but must be proportional”¹⁷⁸, but it also stated that the principle of self-defence “is closely linked with the circumstances under which an operation is established.”¹⁷⁹

The first application of the principle of self-defence to UN peacekeeping operations was laid down by Dag Hammarskjöld when the UN Emergency Force (UNEF) was established by the General Assembly in 1956.¹⁸⁰ While UNEF was not the first peacekeeping operation that was established, it was the first one with armed military personnel. Hence the question of the use of force in self-defence became an issue in the course of its operation. In his 1958 annual report to the General Assembly summarizing the short practice of the Organization in peacekeeping operations and raising some outstanding issues together with some recommendations, Hammarskjöld proposed parameters of self-defence appropriate for the UN peacekeeping forces and encouraged confirmation from the General Assembly of those parameters for future guidance:

In certain cases this right [right to self-defence] should be exercised only under strictly defined conditions. A problem arises in this context because of the fact that a wide interpretation of the right of self-defence might well blur the distinction between operations of the character discussed in this report and combat operations, which would require a decision under Chapter VII of the Charter, and an explicit, more far-reaching delegation of authority to the Secretary-General than would be required for any of the operations discussed here. A reasonable definition seems to have been established in the case of UNEF, where

¹⁷⁸ *Id.*, at 371.

¹⁷⁹ *Id.*, at 372.

¹⁸⁰ The operational recommendations for UNEF were set as:

“1. . . In general, UNEF troops shall not fire except in self-defence, i.e. when they are fired upon first, or when they are threatened by the advance of an armed person or group of persons with the apparent intention to attack a UNEF sentry post, a patrol or an individual.
2. When a person is seen in the act of stealing/pilfering or loitering about in a suspicious manner in the proximity of UNEF installations or property being guarded by UNEF personnel, efforts should be made to apprehend him and to hand him over to the nearest police station. Fire, in this case, will not be resorted to except when the persons are armed and danger to the safety of UNEF personnel is apparent, i.e. principle in para 1 above applies.
3. In all cases, only that amount of force shall be used which the situation warrants.

The principle of minimum force will always be borne in mind.”

UNEF Headquarters, Gaza, ‘Use of force by UNEF personnel’, HQ UNEF, 1911/12-4 (OPS), 6 Feb. 1958, UN Archives DAG13/3.11.1.1, #4 (Quoted in TREVOR FINDLAY, *USE OF FORCE IN UN PEACEKEEPING OPERATIONS* 41-42 (2002)).

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the rule is applied that men engaged in the operation may never take the initiative in the use of armed force, but are entitled to respond with force to an attack with arms, including attempts to use force to make them withdraw from positions which they occupy under orders from the Commander, acting under the authority of the Assembly and within the scope of its resolutions. The basic element involved is clearly the prohibition against any *initiative* in the use of armed force.¹⁸¹

Hammarhjöld's concern was also to distinguish the use of force for self-defence and the use of force in an enforcement operation under Chapter VII.

In the peacekeeping operation in Cyprus in 1964, the Secretary-General followed the operational directive that was used in the UN Operation in Congo in 1960 as regards the right to self-defence: "the defence of United Nations posts, premises and vehicles under armed attack; the support of other personnel of UNFICYP under armed attack. ... where the safety of the Force or of members of it is in jeopardy; ... where specific arrangements accepted by both communities have been, or in the opinion of the commander on the spot are about to be, violated thus risking a recurrence of fighting or endangering law and order."¹⁸²

The inclusion of defence of mission in the right to self-defence came about in connection with the establishment of the second UNEF in 1973. It was introduced by Secretary-General Kurt Waldheim for the peacekeeping operation in the Middle East between Israel and Egypt. In his report to the Security Council on the terms of reference of the second UNEF in 1973, the Secretary General broadened the scope of self-defence. Without defining the totality of the scope of the right to self-defence, he included use of force for the implementation of the mandate by UNEF:

The force will be provided with weapons of a defensive character only. It shall not use force except in self-defence. Self-defence would include resistance to attempt by forceful means to prevent it from discharging its duties under the mandate of the Security Council.¹⁸³

The principle of use of force in defence of mission was accepted by the Security Council and became a standard principle in all UN peacekeeping

¹⁸¹ U.N. Secretary General, Summary study of the Experience Derived from the Establishment and Operation of the Force, § 179, U.N. Doc A/3943 (Oct. 16, 1958).

¹⁸² Note by the Secretary-General, § 16-17, U.N. Doc. Doc. S/5653 (April 11, 1964).

¹⁸³ U.N. Secretary General, Report of the Secretary-General on the Implementation of Security Council resolution 340, § 4(d), U.N. Doc. S/11052/Rev.1 (Oct. 27, 1973).

operations ever since.¹⁸⁴ This was an expansion or an adaptation of the scope of self-defence as generally understood in international law.

The Security Council also has expanded the right to self-defence to include specific aspects of its mandates. For example, in a series of resolutions on Bosnia and Herzegovina, the Security Council, having created the UN Protection Force (UNPROFOR), expanded the mandate of the force to establish and protect safe areas.¹⁸⁵ And again, acting under Chapter VII, the Security Council expanded the mandate of UNPROFOR with a right to self-defence as including “the use of force in reply to bombardments against the safe areas by any of the parties or to armed incursion to them or in the event of deliberate obstruction in or around those areas to the freedom of movement of UNPROFOR or of protected humanitarian convoys”.¹⁸⁶

3. Withdrawal from the United Nations: Indonesian Withdrawal 1965

Contrary to the Covenant of the League of Nations which contained provisions for withdrawal of members, the Charter deliberately omits the subject. The Dumbarton Oaks Proposal did not include any provision to that effect. A review of the discussions in the San Francisco Conference shows that the majority of the negotiating States saw any provisions for withdrawal as contrary to a permanent universal Organization. Such a provision might also lead to so-to-speak blackmail of the Organization by a State in return for special privileges for remaining in the Organization. When the issue was discussed in Committee I/2, nineteen Members voted in favour of the inclusion of such a provision and twenty-two States voted against such a provision. But it was agreed to include in the report of the Committee the following paragraphs on withdrawal:

The Committee adopts the view that the Charter should not make express provisions either to permit or to prohibit withdrawal from the

¹⁸⁴ United Nations, General Guidelines for Peacekeeping Operations 20 (1995), provides that: “Since 1973, the guidelines approved by the Security Council for each peace-keeping force have stipulated that self-defence is deemed to include resistance to attempts by forceful means to prevent the peacekeeping force from discharging its duties under the mandate of the Security Council. This is a broad conception of ‘self-defence’ which might be interpreted as empowering United Nations personnel to open fire in a wide variety of situations.”

UNITED NATIONS, PEACEKEEPING OPERATIONS PRINCIPLES AND GUIDELINES 31 34 (2008), lists “non-use of force except in self-defence and in defence of mandate” as one of the three principles of the peacekeeping operations. *See also* Findlay, *supra* note 180, at 100 - 102.

¹⁸⁵ S.C. Res. 824 (May 6, 1993).

¹⁸⁶ S.C. Res. 836, § 9 (Jun. 4, 1993).

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Organization. The Committee deems that the highest duty of the nations which will become Members is to continue their cooperation within the Organization for the preservation of international peace and security. If, however, a Member because of exceptional circumstances feels constrained to withdraw and leaves the burden of maintaining international peace and security on other Members, it is not the purpose of the Organization to compel that Member to continue its cooperation in the Organization.

It is obvious, particularly, that withdrawals or some other forms of dissolution of the Organization would become inevitable if, deceiving the hopes of humanity, the Organization was revealed to be unable to maintain peace or would do so only at the expense of law and justice.

Nor would a Member be bound to remain in the Organization if its rights and obligations as such were changed by Charter amendment in which it has not occurred, and which it finds unable to accept, or if an amendment duly accepted by necessary majority in the Assembly or in a general conference fails to secure the ratification necessary to bring such amendment into effect.¹⁸⁷

The sole issue of withdrawal came about in 1965 when Indonesia withdrew from the UN as a protest against the seating of Malaysia as a member of the Security Council. The manner in which the three principal Organs of the UN in consultations with each other addressed this issue is notable.

The First Deputy Prime Minister for Foreign Affairs of Indonesia orally confirmed the written notice given to the Secretary-General that Indonesia “has decided ... to withdraw from the United Nations.”¹⁸⁸ The notice also stated that “Indonesia still upholds the lofty principles of international cooperation as enshrined in the United Nations Charter.”¹⁸⁹ The Secretary-General circulated the Indonesian letter to all the members of the UN and held private consultations with Members of the Security Council and heads of regional groups. Neither the Security Council nor the General Assembly took any formal action on the Indonesian letter. The Secretary-General also circulated an informal aide memoire (29

¹⁸⁷ DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION SAN FRANCISCO, 1945, Vol. VII 328 - 329 (1945). For a discussion of the debate on withdrawal from the Charter during the San Francisco Conference see Hans Kelsen, *Withdrawal from the United Nations*, 1 WESTERN POL. Q. 29 (1948); LELAND M. GOODRICH AND EDVARD HAMBRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 142-145 (2nd ed., 1949).

¹⁸⁸ 1966 U.N. Jurid. Y.B. 222, U.N. Doc. ST/LEG/SER.C/4.

¹⁸⁹ *Id.*

January 1965) in the course of his consultations indicating that the Indonesian withdrawal letter “gives rise to a situation for which there is no precedent in the history of the Organization and for which no express provision is made in the Charter.”¹⁹⁰ The aide memoire also indicated certain necessary administrative steps required, such as the removal of the Indonesian flag, name-plate, etc. Following these administrative steps, Indonesia ceased to be listed as a Member of the Organization or of the UN principal and subsidiary organs of which it had been a member by virtue of its Membership in the UN. Nor was the name of Indonesia included in the General Assembly resolution fixing the scale of assessments of Member States for the financial years 1965, 1966 and 1967 nor was Indonesia assessed as a non-member for the expenses of certain organs in which non-members participate.

Following his consultations with Member States, and notwithstanding the administrative steps which were taken for withdrawal of Indonesia’s Membership, the Secretary-General in his reply to Indonesia’s notice of withdrawal, introduced a twist in interpreting Indonesia’s notice of withdrawal. In his letter, the Secretary-General concluded that he hoped that “in due time it [Indonesia] will resume full co-operation with the United Nations.”¹⁹¹ Indonesia invoked the statement a year later, in September 1966, informing the Secretary-General that it had decided “to resume full co-operation with the United Nations”.¹⁹² Hence the interpretation by the Secretary-General allowed for the return of Indonesia to the membership of the UN without having to comply with Charter Article 4’s requirements. The Secretary-General, again having ascertained, by way of consultations, whether this was the general view of the membership, gave instructions for the administrative action necessary for the resumption of Indonesia’s participation.¹⁹³

4. The Role of the Secretary-General as the Chief Administrative Officer: Article 97 of the Charter

In a study prepared by the Secretary-General regarding the role of the Secretary-General under Article 97 of the Charter, it was stated that there are “few legal signposts in the Charter, or in general constitutional theory, indicating with any precision what functions the Secretary-General is to

¹⁹⁰ *Id.*, at 223.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

exercise as chief administrative officer”.¹⁹⁴ The study began with the premise that “the only guide that can be found is the actual practice of the Organization, which on the one hand constitutes a valid basis for interpreting the Charter and on the other hand constitutes the point of departure for any change in the relationship between the organs.”¹⁹⁵ The study concluded that it was not feasible “to define precisely, from a legal point of view” the functions of the Secretary-General.¹⁹⁶ It further stated that the functions of the Secretary-General and the boundaries between his functions and that of the other principal or subsidiary organs of the UN “have not been susceptible of codification, but rather have been established *dynamically* in response to political and financial pressures, as moderated by tradition and precedent.”¹⁹⁷

From the establishment of the Organization, the role of the Secretary-General through the Secretariat in interpreting the Charter was significant. It was accomplished by the provision of legal opinions and the daily advice to various organs and subsidiary organs of the UN with regard to the scope and manner of their operation based on the Charter and the respective constituent instruments.¹⁹⁸ In addition, the Secretariat has become the depository of the collective memory and practices of the UN, sorting out those practices systematically and deploying them as precedents for future practice. While selected legal opinions of the Secretariat are reproduced as part of the United Nations Juridical Yearbook, many are not published and some remain confidential. It is now a common practice for the Organs and subsidiary organs of the UN to ask for a legal opinion when there is uncertainty about either their rules of procedure, the scope of their competence or Charter interpretation. Legal advice is also offered by the Secretariat orally to Chairs or the Bureau of the Organs and subsidiary organs; these are not published. Hence the manner in which the Secretariat interprets the Charter and the constituent instruments of subsidiary organs influences the subsequent interpretative decisions by these Organs and subsidiary organs with respect to their constituent instruments.

Sometimes Secretaries-General have expressed their opinions on the interpretation of the Charter in the reports they issue under their own

¹⁹⁴ 1982 U.N. Jurid. Y.B. 189, § 1, U.N. Doc. ST/LEG/SER.C/20.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*, at 198, § 41.

¹⁹⁷ *Id.*, at 198 – 199, § 41. [Italics added].

¹⁹⁸ For a statement of the role and influence of the legal opinions of the Secretariat see, Schachter, *supra* note 100.

auspices. These reports, while not binding, may influence formation of opinions within the UN organs. In his 1992 report on an *Agenda for Peace*, the Secretary-General, Boutros Boutros Ghali, concerned about the Council's practice of outsourcing the use of force to a single or a group of States, recommended the revival of Article 43 of the Charter.¹⁹⁹ Under it, the Member States undertake to negotiate special agreements to make armed forces, assistance and facilities available to the Security Council on a permanent basis for the purposes of Article 42. This provision was never implemented. Secretary-General, Kofi Annan, in a 2005 report entitled *In larger freedom: towards development, security and human rights for all*, observed that the threats to peace and security in the twenty-first century, such as from international war, civil war, organized crimes, terrorism and weapons of mass destruction, go far beyond what had been contemplated. They also include "poverty, deadly infectious disease and environmental degradation since these can have equally catastrophic consequences."²⁰⁰

5. The Good-Offices of the Secretary-General: Article 98 of the Charter

In addition to Article 97 of the Charter, Article 98 of the Charter provides that the Secretary-General shall act in that capacity at the meetings of the General Assembly, the Security Council, the Economic and Social Council and the Trusteeship Council and shall perform such functions as are entrusted to him by these Organs.²⁰¹ Nothing in Article 98 speaks of his undertaking good-offices functions for the Secretary-General independently of what may be assigned to him by these three Organs. The implication is that request and authorization by these Organs are necessary for the performance of these functions. But since its inception, the diplomatic functions of the Secretary-General have increased significantly. The report of the United Nations Preparatory Commission stated that "The Secretary-General may have an important role to play as a mediator and as an informal adviser of many

¹⁹⁹ UN Doc A/47/277 - S/24111, § 43.

²⁰⁰ UN Doc A/59/205, § 78.

²⁰¹ Article 98 of Charter reads:

"The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs. The Secretary-General shall make an annual report to the General Assembly on the work of the Organization."

governments.”²⁰² The Secretary-General seems to have relied on this statement to enhance his diplomatic efforts, including good-offices and fact-finding initiatives.

During the Cold War, the Secretary-General’s expansion of his competence beyond the language of Article 98 of the Charter, while generally accepted, was initially questioned, including by some Permanent Members of the Security Council. But the questions did not manifest themselves in outright opposition or attempts to stop his actions. Below are some examples where there were objections to initiatives of the Secretary-General.

The long-standing tension between Cambodia and Thailand became intense in 1966. Secretary-General U Thant, who had been involved in previous disputes between the parties, appointed, in consultations with them, a special representative to investigate and propose ways of settling the border dispute. The Soviet Union, by a letter to the President of the Security Council, objected, stating that: “under the UN Charter decisions on matters connected with action by the UN relating to the maintenance of international peace and security are taken by the Security Council.”²⁰³ Argentina and Uruguay did not share the view of the Soviet Union.²⁰⁴

In a dispute between Equatorial Guinea and Spain in 1969, the President of Equatorial Guinea, writing to the Secretary-General, accused Spain of aggression and asked for the dispatch of UN peacekeeping forces. The Secretary-General, U Thant, informed the President that such a request could be addressed to and be authorized by the Security Council, but that the President had not asked for a meeting of the Security Council. Following further communications between the Secretary-General, the President of Equatorial Guinea and Spain, the Secretary-General stated that if Equatorial Guinea had no objections, he was prepared to dispatch his personal representative, as an exercise of good-offices, to explore ways of reducing tension and possibly settling the dispute. Since there was no objection, the Secretary-General dispatched his personal representative to Equatorial Guinea. He also informed the Security Council of the step he had taken. In explaining the basis for his action,

²⁰² Report of the Preparatory Commission of the United Nations, 86, §16, U.N. Doc. PC/20 (Dec. 23, 1945).

²⁰³ Permanent Rep. of the Soviet Socialist Republics to the U.N., Letter dated 27 August 1966 from the Representative of the Union of Soviet Socialist Republics Addressed to the President of the Security Council, U.N. Doc. S/7478 (Aug 27, 1966).

²⁰⁴ Repertory of Practice of United Nations Organs, Supp. No. 4 (1966-1969), Vol. 2, 344-354, §§ 5-7.

the Secretary-General noted that he had taken such steps several times in the past without prior consultations or authorization of the Security Council.²⁰⁵ His notification to the Security Council, he noted, was not for authorization, but for information only.²⁰⁶ The Soviet Union objected to the independent initiative of the Secretary-General, both to his independent appointment of a special representative for such matters and to the scope of the mandate that he had assigned to his representative, namely to assist “in the solution of its [Equatorial Guinea’s] differences with Spain, to help the parties in settling their difficulties peacefully and also in lessening the tension in Equatorial Guinea.”²⁰⁷ :

In this connexion the USSR Mission to the United Nations considers it necessary to emphasize that under the United Nations Charter decisions on matters connected with actions by the United Nations relating to the maintenance of international peace and security was taken by the Security Council.²⁰⁸

The scope of the Secretary-General’s activity with regard to his good-offices was raised again in 1970, in connection with Iran’s territorial claim to Bahrain following the decision of the United Kingdom to withdraw from Bahrain. At the invitation of Iran and the United Kingdom for the exercise of his good-offices, the Secretary-General appointed a special representative to inquire about the wishes of the population in Bahrain and to make proposals for the resolution of the dispute. Both governments agreed to accept the recommendations of the Secretary-General’s representative if the Security Council endorsed it. The Secretary-General’s representative did polling for two weeks in Bahrain and concluded that the great majority of people wished Bahrain to become independent. The Secretary-General submitted his special representative’s report for approval by the Security Council.²⁰⁹ In

²⁰⁵ He stated that: “Several times in the past, he pointed out, he had taken similar action without prior consultation with the President or members of the Security Council; he had only reported without delay to the Council the action taken on his own initiative, as he had been in the process of doing in the present case, and had not intended to establish any precedent of prior consultation.” U.N. Secretary-General, Annual Report of the Secretary-General on the Work of the Organization, 16 June 1968-to 15 June 1969, 59, U.N. Doc. A/7601 (Jun. 15, 1969).

²⁰⁶ *Id.*

²⁰⁷ Permanent Rep. of the Soviet Socialist Republics to the U.N., Letter dated 19 March 1969 from the Permanent Representative of the Union of Soviet Socialist Republics to the President of the Security Council, U.N. Doc. S/9101 (Mar. 19, 1969).

²⁰⁸ *Id.*

²⁰⁹ Note by the Secretary-General, U.N. Doc. S/9772 (Apr. 30, 1970).

explaining his position, the Secretary-General stated that: "In agreeing to that, he had had in mind that such action by the Secretary-General, at the request of Member States, had become customary in UN practice and in certain situations had proved to be a valuable means of relieving and preventing tension which could otherwise be prolonged or aggravated by premature disclosure and public debate."²¹⁰

The report was discussed in the Security Council and the Council unanimously endorsed the recommendation of the Secretary-General in resolution 278, on 11 May 1970. The Soviet Union again objected to the role of the Secretary-General in the absence of the participation of the Security Council. It considered that the measures recommended could lead to international complications on which the Security Council should have been consulted rather than informed *ex post facto*:

It is a matter of common knowledge that according to the Charter of the United Nations, questions of this kind and the decisions taken on them come within the jurisdiction of the Security Council. The Statement in the note that actions such as this by the Secretary-General 'have become customary in United Nations practice' cannot serve to justify these actions, for it is widely known that this illegal practice was forced upon the United Nations in the past by certain Powers contrary to and in violation of the Charter.²¹¹

France also expressed concern that on matters such as this, the Security Council should have the last word. France also was of the view that the Security Council should have been associated with the measures at earlier stages. The concern of France was also with the manner in which the investigation into the wishes of the population of Bahrain was conducted:

The inquiry conscientiously carried out by [the Secretary-General's representative] and his collaborators seems to cover all the representative elements of the population, who spoke out freely. The fact remains, however, that sounding out public opinion cannot have the legal value of a democratic consultation, and it is justified in this particular case only by the objective to be attained.²¹²

²¹⁰ Repertory of Practice of United Nations Organs, Supp. No. 5 (1970-1978), Vol. 5, Chap. XV, Art. 98, 686, *available at* http://legal.un.org/docs/?path=../repertory/art98/english/rep_supp5_vol5_art98.pdf&lang=EFS [last visited Jan. 30, 2017].

²¹¹ Permanent Rep. of the Soviet Socialist Republics to the U.N., Letter dated 3 April 1970 from the Permanent Representative of the USSR to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/9737 (Apr. 3, 1970).

²¹² U.N. SCOR, 1536th mtg. at § 157, U.N. Doc. S/PV.1536 (May 11, 1970).

The practice of good-offices of the Secretary-General also involved, in at least one case, a ruling by the Secretary-General in the form of an arbitration award. In 1985, following an undercover operation, the French military security service sank the Greenpeace ship *Rainbow Warrior* in Auckland Harbour, in New Zealand, killing a Dutch photographer. The *Rainbow Warrior* had been planning to disrupt French Nuclear tests in French Polynesia. New Zealand caught and convicted two members of the French secret service. Following a series of diplomatic exchanges between France and New Zealand, the two governments decided to seek the good-offices of Secretary-General Javier Pérez de Cuéllar with respect to their dispute, in particular about compensation and the treatment of the two apprehended agents. The Secretary-General accepted the invitation by the two governments. After having received the written submissions of the parties, the Secretary-General issued his ruling on 6 July 1986.²¹³

The Secretary-General's interpretation of Article 98 of the Charter has expanded the scope of the Office's initiative independent of the Security-Council. In interpreting his functions under Article 98, the Secretaries-General have also invoked Article 33 of the Charter which provides in paragraph 1 that "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." To the extent that the parties to a conflict seek assistance from the Secretary-General, some Secretaries-General seem willing to take the initiative without authorization of the Security Council. At a press conference held on 21 February 1984, Secretary-General Pérez de Cuéllar said that the term "good offices" was a very flexible one as it might mean very little or very much:

As Secretary-General of the United Nations, I am encouraged when States respond positively to the offer of my services. If two parties are unable or unwilling to sit down at the same table, action from some third quarter-such as the United Nations is indispensable. But, in such a situation, each party must feel that it will not incur a disadvantage by responding to my good offices. And, in making my good offices available, timing is of critical importance.²¹⁴

²¹³ Case Concerning the Differences between New Zealand and France arising from the Rainbow Warrior Affair, 19 R.I.A.A. 199 (Ruling of the Secretary-General, 1986).

²¹⁴ U.N. Doc. SG/SM/3525, at 5, reproduced in Repertory of Practice of United Nations Organs, Supp. No. 6 (1979-1984), Vol. 6, Chap. XV, Art. 98, at 117; reproduced also in U.N. OFF. LEGAL AFF., HANDBOOK ON PEACEFUL SETTLEMENT OF DISPUTES, at 35, U.N.

Only a few States have challenged the competence of the Secretary-General as now established by practice which goes beyond what was contemplated in Article 98 of the Charter. The Secretary-General, however, has kept the Security Council informed of his independently exercised good-offices activities. Only in one case, the question of Bahrain, was the method by which the good-offices was exercised questioned, but not challenged, by France and the Soviet Union.

The practice of the good-offices of the Secretary-General developed during the Cold War was a period fraught with tension in international relations and the consequent paralysis of the Security Council and in general the political dynamics within the UN. That provided an opportunity and need for the Office of the Secretary-General to fill some of the vacuum by becoming more active diplomatically. While it is clear that every Secretary-General determines the scope of good-offices he or she wishes to exercise – a matter clearly linked to the personality and diplomatic skills of individual Secretaries-General as well as the willingness of the Security Council to provide a space for more assertive independent use of the good-offices – in principle Secretaries-General have taken a broad understanding of the term “good-offices”:

[Good-offices] is a very flexible term as it may mean very little or very much. But, in an age in which negotiations have to replace confrontation, I feel that the Secretary-General's good offices can significantly help in encouraging Member States to bring their disputes to the negotiating table. Negotiations today have a character quite different from what they had in the past. ...The task of the United Nations and the purpose of the good offices of the Secretary-General is to make the discharge of this obligation easier. In view of the complexity of the issues which arise in our dynamic world, traditional diplomacy can no longer suffice. New methods and devices have become important.²¹⁵

But the latitude for interpretation is not unlimited. The practice shows that the Security Council jealous of its prerogatives, remains assertive in controlling the scope of the good-offices of the Secretary-General to ensure that it does not usurp its own competence under the Charter.

Doc. OLA/COD/2394, U.N. Sales No. E.92.V.7 (1992). At a press conference held on 22 May 1984, Secretary-General Pérez de Cuéllar said that Article 99 gave him some room for acting and for working in what he usually called “our quiet preventative diplomacy”. See SG/SM/3560, p. 4, at Repertory of Practice in, *Id.*, at § 575.

²¹⁵ SG/SM/3525, at 4, reproduced in *Id.*

D. Non-implementation of Certain Provisions of the Charter

Since the establishment of the UN, it is generally agreed that some provisions of the Charter, deliberately, have not been implemented.

Article 23(1) of the Charter is an example. It provides that the General Assembly shall elect non-Permanent Members of the Security Council and in this respect “due regard being specially paid, *in the first instance* to the contribution of Members of the UN to the maintenance of the international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.”²¹⁶ The practice of the General Assembly shows the emphasis on equitable geographical distribution and the first two criteria are disregarded.²¹⁷ The Charter does not define the important criteria of the forms of contribution to the maintenance of international peace and security or other purposes of the Charter. In the context of the Charter and its subsequent development, those criteria could be military or economic power, or the active role in the settlement of international disputes.²¹⁸ But in practice, only the criterion of geographical distribution has been taken into consideration.²¹⁹

Article 43 of the Charter, as mentioned earlier, is another clear example of non-implementation. This Article was an essential component of the collective security system as originally established under the Charter. It requires the Member States of the UN to make available to the Security Council armed forces, assistance and facilities necessary for maintaining international peace and security. Member States were obliged to conclude special agreements on the initiative of the Security Council. Because of disagreement on the contribution of troops by Permanent Members and the location of such a standing force, no such agreements have been concluded.²²⁰

²¹⁶ U.N. Charter Art. 23 (1) emphasis added.

²¹⁷ See F Wilcox, *supra* note 81, at 5; S. Engel, *Procedures for the de facto Revision of the Charter*, 59 PROC. AM. SOC’Y INT’L L. ANN. MTG. 108, 111 (1965).

²¹⁸ THE CHARTER OF THE UNITED NATIONS, A COMMENTARY 395 (B. Simma et al. ed., 1994) [hereinafter “Simma, Charter”].

²¹⁹ *Id.*

²²⁰ Wilcox, *supra* note 81, at 5; Engel, *supra* note 217, at 111; Simma, Charter, *supra* note 218, at 639. In 1992, in U.N. Secretary-General, An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping, U.N. Doc. A/47/277-S/24111 (June 17, 1992), Secretary-General Boutros-Ghali recommended the revival of Article 43. But no action was taken to that effect by the Security Council.

Similarly, Article 45 of the Charter has never been implemented because Article 43 was never implemented. Article 45 requires that Members immediately make available national air-force contingents for combined international enforcement action. These forces were to be made available through an agreement concluded under Article 43.

Article 46 of the Charter has been referred to as the “most obsolete” of all the provisions of Chapter VII.²²¹ This Article provides that “Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.” This Article was never implemented and has been taken over by the practice of making troops available for peace-keeping on a case-by-case basis.

***E. Resolving Inconsistencies in Charter Interpretation between
Different Organs of the United Nations***

From its very first session, in 1946, the issue of how to resolve inconsistencies in interpretation of the Charter among various Organs of the UN was raised.

**1. Interpretation of Articles 11 and 12 of the Statute of the
International Court of Justice**

The Security Council and the General Assembly disagreed with respect to the interpretation of Articles 11 and 12 of the Statute of the International Court of Justice on the elections of judges. Under Article 11 of the Statute: “If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.” Under paragraph 1 of Article 12: “If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the General Assembly and three by the Security Council, may be formed at any time at the request of either the General Assembly or the Security Council, for the purpose of choosing by the vote of an absolute majority one name for each seat still vacant, to submit to the General Assembly and the Security Council for their respective acceptance.”

The President of the General Assembly interpreted the word “meeting” in Article 11 and Article 12(1) as “ballot” and not the meeting of the Assembly during a day in which multiple ballots may be casted.²²² While this view was challenged by some members of the General Assembly, it was upheld by a vote. The Security Council took a different view and

²²¹ Simma, Charter, *supra* note 218, at 644.

²²² See Journal of the General Assembly, No. 24, 442 (Feb. 6, 1946).

agreed with the interpretation offered by the Secretariat that “meeting” means the union of the General Assembly or the Security Council for an entire day during which multiple ballots may be cast.²²³ Discussions in the Assembly and the Security Council included whether to ask for an advisory opinion from the ICJ on the meaning of “meeting”.²²⁴ No advisory opinion was requested, but later in the same session, the Assembly adopted a provisional ruling in the form of resolution 88(I) with regard to the meaning of “meeting” in Articles 11 and 12 of the Statute, but subject to the concurrence of the Security Council.²²⁵

2. The Exercise of the Veto by the Permanent Member

At the first session of the General Assembly, the exercise of the veto by Permanent Members of the Security Council, in particular, by the Soviet Union, aroused the concern of the larger membership of the UN. There were efforts in the plenary of the General Assembly and in the First Committee to abrogate or modify the voting rules in the Security Council in order to curtail the exercise of the veto. To achieve that goal, suggestions were made by the General Assembly for the Permanent Members of the Security Council to agree among themselves to that effect or to interpret the veto right under the Charter. None of the proposals were acceptable to the Permanent Members, but the General Assembly nevertheless adopted Resolution 40(I) on the application and interpretation of Article 27 of the Charter requesting the Permanent Members of the Security Council to consult each other to ensure that the use of the

²²³ *Id.*, at 443. For a description of this event see Pollux, *The Interpretation of the Charter*, 23 BRIT. Y.B. INT'L L. 54, 57-59 (1946).

²²⁴ Journal of the General Assembly, *supra* note 222, at 443-444.

²²⁵ G.A. Res. 88(I) (Nov. 19, 1946) read: “Application of Articles 11 and 12 of the Statute of the International Court of Justice

The General Assembly,

Approves the report on the application of Articles II and 12 of the Statute of the International Court of Justice prepared by the Sixth Committee.

Resolves to adopt provisionally, and subject to the concurrence of the Security Council, the following rule of procedure:

Rule 99A

Any meeting of the General Assembly held in pursuance of the Statute of the International Court of Justice for the purpose of election of members of the Court shall continue until as many candidates as are required for all the seats to be filled have obtained in one or more ballots an absolute majority of votes.

Transmits the foregoing rule to the Security Council for its consideration.”

veto is consistent with the Charter and does not impede the function of the Security Council.²²⁶

F. Specialized Agencies, Interpretation of Their Constituent Instruments

1. Constituent Instruments of Specialized Agencies

Although most of the constituent instruments of the UN Specialized Agencies allow them to request an advisory opinion from the ICJ, initiating the process requires an internal decision by certain organs of the institution. Such mechanisms are incorporated in the Statute of the International Atomic Energy Agency (the “IAEA Statute”) and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (the “CWC”). This naturally diminishes the likelihood of the advisory process serving as an effective limitation on the interpretive discretion of the Agencies.

Under the IAEA Statute (with similar provisions found in the CWC), the ICJ is granted the authority to review the interpretive process of the Statute of the IAEA. Any conflict concerning the interpretation of the Statute of the IAEA, which has not been resolved through negotiations, shall be referred to the ICJ either by the General Conference or by the Board of Governors. Article XVII of the Statute of the IAEA stipulates that:

A. Any question or dispute concerning the interpretation or application of this Statute which is not settled by negotiation shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement.

²²⁶ G.A. Res. 40(I) (Dec. 13, 1946), read: “Voting Procedure in the Security Council
The General Assembly,
Mindful of the Purposes and Principles of the Charter of the United Nations, and having taken notice of divergences which have arisen in regard to the application and interpretation of Article 27 of the Charter:
Earnestly, requests the permanent members of the Security Council to make every effort, in consultation with one another and with fellow members of the Security Council, to ensure that the use of the special voting privilege of its permanent members does not impede the Security Council in reaching decisions promptly;
Recommends to the Security Council the early adoption of practices and procedures, consistent with the Charter, to assist in reducing the difficulties in the application of the Article 27 and to ensure the prompt and effective exercise by the Security Council of its functions;
Further recommends that, in developing such practices and procedures, the Security Council take into consideration the views expressed by Members of the United Nations during the second part of the First session of the General Assembly.”

B. The General Conference and the Board of Governors are separately empowered, subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to give an advisory opinion on any legal question arising within the scope of the Agency's activities.²²⁷

There is a similar mechanism in the Convention Establishing the International Maritime Organization (the “IMO Convention”) and in the Constitution of the Food and Agriculture Organization of the United Nations. Both Conventions provide that the Assembly of the Member States shall have the primary responsibility for the interpretation of the convention, or the dispute may be settled by such other manner as the parties to the dispute may agree. Nevertheless, any dispute that is not settled by such procedures shall be referred to the ICJ for an advisory opinion.²²⁸

Article XIV(2) of the Constitution of the UN Educational, Scientific and Cultural Organization (the “UNESCO Constitution”) provides that “[a]ny question or dispute concerning the interpretation of this Constitution shall be referred for determination to the International Court of Justice or to an arbitral tribunal, as the General Conference may determine under its Rules of Procedure.”²²⁹ However, its Rules of Procedure empower the Legal Committee of the General Conference to recommend interpretations of the Constitution of the organization which may be adopted by a two-thirds majority of members present and voting.²³⁰

²²⁷ Statute of the International Atomic Energy Agency, Art. XVII, Oct. 23, 1956, 276 U.N.T.S. 3; *see also* Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Art. XIV, Jan. 13, 1993, 1974 U.N.T.S. 45.

²²⁸ Convention Establishing the International Maritime Organization, Art. 69 & 70, Mar. 6, 1948, 289 U.N.T.S. 3. [hereinafter “IMO Convention”]; *see also* Constitution of the Food and Agriculture Organization of the United Nations, Art. XVII, Oct. 16, 1945, *available at* <http://www.fao.org/3/a-mp046e.pdf> [last visited Dec 21, 2016].

²²⁹ Constitution of the United Nations Educational, Scientific and Cultural Organization, Art. XIV(2), Nov. 16, 1945, 4 U.N.T.S. 275 [hereinafter, “UNESCO Constitution”].

²³⁰ UNESCO, Rules of Procedure of the General Conference, Rule 38, *available at* <http://unesdoc.unesco.org/images/0024/002439/243996e.pdf#page=22> [last visited Jan. 25, 2017], provides: “Interpretation of the Constitution [Const. XIV.2]
1. The Legal Committee may be consulted on any question concerning the interpretation of the Constitution and of the rules and regulations.
2. Its opinion shall be adopted by a two-thirds majority of members present and voting.

The Constitution of the International Labour Organization (the “ILO Constitution”) provides, under Article 37, that disputes concerning the interpretation of the ILO Constitution as well as conventions adopted pursuant to the ILO Constitution shall be submitted to the ICJ for decision.²³¹ With respect to the dispute concerning conventions concluded pursuant to its Constitution, the ILO Conference may on the recommendation of the Governing Body establish a tribunal for the “expeditious determination” of any such dispute as well.²³² It appears that no such tribunal has been established.²³³

The Constitution of the United Nations Industrial Development Organization (the “UNIDO Constitution”) entrusts the UNIDO Board with settling any dispute between Member States concerning the interpretation of the UNIDO Constitution, unless the parties agree otherwise. If a party is not satisfied with the Board’s decision, the UNIDO Constitution provides for three avenues. The first is a mechanism identical to the dispute settling mechanisms of the IAEA Statute and the CWC, affording an option to submit the dispute to the ICJ. The second is

3. It may decide by a simple majority to recommend to the General Conference that any question concerning the interpretation of the Constitution be referred to the International Court of Justice for an advisory opinion.

4. In cases where the Organization is party to a dispute, the Legal Committee may decide, by a simple majority, to recommend to the General Conference that the case be submitted for final decision to an Arbitral Tribunal, arrangements for which shall be made by the Executive Board.”

²³¹ Constitution of the International Labor Organization, Art. 37, Apr. 1919, 15 U.N.T.S. 40. Article 37 of the ILO Constitution on the interpretation of constitution and conventions provides:

“1. Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice.

2. Notwithstanding the provisions of paragraph 1 of this article the Governing Body may make and submit to the Conference for approval rules providing for the appointment of a tribunal for the expeditious determination of any dispute or question relating to the interpretation of a Convention which may be referred thereto by the Governing Body or in accordance with the terms of the Convention. Any applicable judgement or advisory opinion of the International Court of Justice shall be binding upon any tribunal established in virtue of this paragraph. Any award made by such a tribunal shall be circulated to the Members of the Organization and any observations which they may make thereon shall be brought before the Conference.”

²³² *Id.*

²³³ See generally Claire La Hovary, *The ILO and the Interpretation of Fundamental Rights at Work: A Closer Look at the Possibility of Establishing a Tribunal Under Article 37(2)* (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2815361 [last visited Dec 22, 2016].

a mechanism for review by the ICJ or an arbitral tribunal, subject to the consent of the disputing States. The final avenue is an internal review mechanism by the “conciliation commission”,²³⁴ whose interpretation is only advisory.²³⁵

Another type of mechanism for settling disputes concerning the interpretations of constituent instruments is provided by the Agreement Establishing the International Fund for Agricultural Development (the “IFAD Agreement”), the International Finance Corporation Articles of Agreement (the “IFC Articles”) and the Articles of Agreement of the International Development Association (the “IDA Articles”).

According to the IFAD Agreement (with similar provisions found in both the IDA Articles and the IFC Articles), the Executive Board is the organ authorized to provide interpretations of the IFAD Agreement on any question arising between members or between members and the IFAD. Should a member disagree with the decision, it may appeal it to the Governing Council, whose decision is final.²³⁶ Although all of these conventions provide internal interpretation and review mechanisms, they all include a provision for compulsory arbitration between the organization and member States. For instance, the IFAD Agreement provides that:

In the case of a dispute between the Fund and a State that has ceased to be a Member, or between the Fund and any Member upon the termination of the operations of the Fund, such dispute shall be submitted to arbitration by a tribunal of three arbitrators.²³⁷

The final type of mechanism, and in fact the most detailed, is provided in the Convention on International Civil Aviation (the “ICAO Convention”). According to the ICAO Convention, the Council of the ICAO shall have the authority to interpret the Convention. In case of any

²³⁴ Constitution of the United Nations Industrial Development Organization, Art. 22, Apr. 9, 1979, 1401 U.N.T.S. 3, *available at* http://www.unido.org/fileadmin/user_media/UNIDO_Header_Site/About/UNIDO_Constitution.pdf [last visited Dec. 21, 2016].

²³⁵ *Id.*, at Annex III, Art. 4(b).

²³⁶ Agreement Establishing the International Fund for Agricultural Development, Art. 11, Jun. 13, 1976, 1059 U.N.T.S. 192; *see also* Articles of Agreement of the International Finance Corporation, Art. VIII, as amended Jun. 27, 2012, *available at* http://www.ifc.org/wps/wcm/connect/1c95b500484cb68d9f3dbf5f4fc3f18b/IFC_Articles_of_Agreement.pdf?MOD=AJPERES [last visited Dec. 21, 2016]; Articles of Agreement of the International Development Association, Art. X, Sep. 24, 1960, *available at* <http://ida.worldbank.org/sites/default/files/IDA-articles-of-agreement.pdf> [last visited Dec. 21, 2016].

²³⁷ *Id.*

disagreement regarding the interpretation of the ICAO Convention by the Council, the ICAO Convention provides for an obligatory dispute settling mechanism. Article 84 of the ICAO Convention provides that:

If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote on the consideration by the Council of any dispute to which it is a party. Any contracting party may, subject to Article 85, appeal from the decision of the Council to an *ad hoc* arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice...²³⁸

Although the ICAO Convention seemingly provides the most extensive review mechanism for internal interpretations of constituent instruments, none of the five cases that were presented before the Council of the ICAO was decided on its merits. They were all settled through negotiations and not resolved by the Article 84 arbitral process.²³⁹

A review of the various constituent instruments of the UN Specialized Agencies thus demonstrates that although most allow reference to the ICJ, such review is subject either to the consent of the parties or to the decision of the organization itself. Very few advisory opinions have been given by the ICJ following requests by specialized agencies.²⁴⁰

2. Practice of Interpretation of Constituent Instruments by Specialized Agencies

The following section provides some examples of the interpretive practice of various UN Specialized Agencies to ascertain whether there

²³⁸ Convention on International Civil Aviation, Art. 84, available at http://www.icao.int/publications/Documents/7300_cons.pdf [last visited Dec. 25, 2016]. See generally Mathieu Vaugeois, *Settlement of Disputes at ICAO and Sustainable Development* (McGill Occasional Paper Series No. IV, Jun. 2016), available at https://www.mcgill.ca/iasl/files/iasl/occasional_paper_iv_settlement_of_disputes.pdf [last visited Dec. 23, 2016]. Article 85 prescribes a procedure for electing arbitrators for States that are not members of the ICJ. However, since all members of the ICAO are also party to the United Nations Charter, this Article has become irrelevant. See *Id.*, at 2. The Convention was drafted on 7 December 1944, hence the reference to the Permanent Court of International Justice.

²³⁹ See Vaugeois *Id.*, at 5-6.

²⁴⁰ According to the International Court of Justice a total of only five advisory opinions were requested by authorized Specialized Agencies of the United Nations, see INTERNATIONAL COURT OF JUSTICE, *Organs and Agencies of the United Nations Authorized to Request Advisory Opinions*, available at <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2&p3=1> [last visited Dec 21, 2016]

have been effective limitations on review of the internal interpretation process.

a) World Health Organization

As will be elaborated later in this Report,²⁴¹ the World Health Organization (“WHO”) interpreted its constituent instrument as granting it the authority to request an advisory opinion of the ICJ concerning the legality of the threat or use of nuclear weapons, based on the view that the issue falls within the functions of the WHO and is thus within its competence. The ICJ rejected this interpretation.²⁴²

b) World Trade Organization

The World Trade Organization is not a Specialized Agency of the United Nations, but because of its standing as the most important international organization in trade and its practice, it is covered in the report.

The constituent instrument of the World Trade Organization (the “WTO”), includes the “Marrakesh Agreement”, establishing the World Trade Organization, as well as other agreements (the “WTO Agreements”), which are, as Julian Arato describes them, “a complex web of agreements linking together a coherent system of trade law reaching back across the past half century”.²⁴³ Under the Marrakesh Agreement, the Ministerial Conference and the General Council have the exclusive authority to adopt an interpretation of the WTO Agreements.²⁴⁴ Additionally, in practice, the WTO Appellate Body, through the appeals process, has both the occasion and, by implication, the *de facto* authority to interpret the WTO Agreements via its reports, which are binding unless all parties, agree otherwise.²⁴⁵

In its interpretation of the WTO Agreements, the WTO Appellate Body operates under self-imposed limitations.²⁴⁶ Arato comments that:

In sum, the WTO-AB [Appellate Body] will only consider the conduct of the parties where two conditions are met: first, if there is evidence that a

²⁴¹ *Infra*, text to notes 325 - 326.

²⁴² *Infra*, text to notes 329 - 348.

²⁴³ Julian Arato, Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations, 38 YALE J. INT’L L. 289, 312 (2013).

²⁴⁴ Marrakesh Agreement establishing the World Trade Organization, Art. IX(2), Apr. 15, 1994, 1867 U.N.T.S. 3.

²⁴⁵ See Arato, *supra* note 243, at 312.

²⁴⁶ The WTO Appellate Body subjects its interpretations to the consent of the parties and limits the extent and use of “subsequent practice” in its interpretations. *Id.*, at 316.

substantial number of parties have actively engaged in the practice, no states have acted in a directly contrary fashion, and the acquiescence of the others can be demonstrated (as opposed to simply presumed on the basis of their silence); and second, if there is some determinate evidence that the practice actually represents an agreement of the parties regarding interpretation. And even where such conditions are met, the Appellate Body will only rely on such practice to interpret the Agreements-never to modify their provisions.²⁴⁷

The practice of the WTO Appellate Body demonstrates that its interpretations do evolve, but they do so subject to constraints. For example, where it comes to the issue of subsequent practice of the parties, the WTO Appellate Body has refused to consider decisions by organs of the WTO as representing subsequent practice and has maintained that only practice by all and not a majority of the parties would constitute subsequent practice for the purpose of interpreting the WTO Agreements.²⁴⁸ However, in the *Chicken Cuts* case, the WTO Appellate Body lowered the bar, by including as subsequent practice, under specific circumstances, practice which, though it is not engaged in by all the parties, is engaged in by many parties with the silent acceptance of the rest.²⁴⁹

Thus, although the WTO Appellate Body has an implicit authority to interpret the WTO Agreements with very limited prospect for any review of its decisions, it has exercised this authority with self-restraint and subject to self-imposed limitations.

c) International Maritime Organization

In the meeting held on January 15, 1959, the Assembly of the International Maritime Organization (the “IMO”) adopted a resolution presented by the United Kingdom. The resolution contained an interpretation of Article 28(a)²⁵⁰ of the IMO Convention that enabled the

²⁴⁷ *Id.*

²⁴⁸ *Id.*, at 314.

²⁴⁹ *Id.*; Appellate Body Report, European Communities – Customs Classification of Frozen Boneless Chicken Cuts, § 272, WTO Doc. WT/DS269/AB/R (adopted Set. 12, 2005).

²⁵⁰ IMO Convention, *supra* note 228, at Art. 28(a) read: “The Maritime Safety Committee shall consist of fourteen Members elected by the Assembly from the Members, governments of those nations having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations, and the remainder shall be elected so as to ensure adequate representation of Members, governments of other nations with an important interest in maritime safety, such as nations interested in the supply of large numbers of crews or in the carriage of large numbers of berthed and unberthed passengers, and of major geographical areas.”

Assembly to refrain from electing two States, Libya and Panama, which were amongst the nine States with the highest registered tonnage of shipping, to the Maritime Safety Committee.

The United Kingdom and the Netherlands argued that (a) Article 28(a) did not require that the nine “largest ship-owning nations” automatically be elected but that the Assembly has discretion, and (b) that the definition of the “largest ship-owning nations” was based on actual ownership interest of the citizens of the State, or the State, rather than registration.²⁵¹ This interpretation was strongly opposed by a number of States including the United States.²⁵² Failing consensus, the contested interpretation was submitted by a decision of the Assembly to the ICJ for an advisory opinion.

The ICJ ruled that both interpretations were inconsistent with the IMO Constitution. Basing its decision on the “natural meaning” of Article 28(a), the *travaux préparatoires* of the IMO Convention and the subsequent practice of the IMO, the Court decided that Article 28(a) intended that the nine “largest ship-owning nations” would be automatically elected to the Maritime Safety Committee and that the only way to determine which States these were, was to use registered shipping tonnage, as supported by international practice.²⁵³

d) *World Intellectual Property Organization*

The Convention Establishing the World Intellectual Property Organization (the “WIPO”) does not stipulate which organ is responsible for the interpretation of its constituent instrument. Nor, unlike other UN

²⁵¹ Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, 1960 I.C.J. Rep. 150, 154-157, 165-166 (Jun. 8) [hereinafter “ICJ, *Maritime Safety*”].

²⁵² The view of the United States summarized by the Court: “For his part, the representative of the United States of America explained the way in which that country interpreted Article 28 (a). He stated: ‘That Article called on the Assembly to elect from among the Member Governments which had an important interest in maritime safety the eight nations which were the largest shipowners, as shown by the statistical tables in Lloyd’s Register ... Article 28 stipulated that no less than eight should be ‘the largest ship-owning nations’ and not merely ‘large ship-owning nations’ ... they should be elected automatically.’” Later he said that he could not accept the argument advanced by the United Kingdom representative to the effect that the ability of countries to contribute to the work of the Maritime Safety Committee by their expert knowledge and experience was a criterion of eligibility separate from that of status as one of the largest shipowning nations. In no circumstances should the two nations whose combined registered tonnage represented 15 per cent. of the active fleet of the entire world be excluded from membership of the Committee.” *See Id.*, at 157.

²⁵³ *Id.*, at 159 – 171.

Specialized Agencies, does it stipulate the consequences of disputes over such interpretations. This could be partly due to the objectives and functions of the WIPO. Governments have negotiated multilateral treaties in various areas of intellectual property and each of these treaties establishes a “Union” of States that have agreed to afford the same protections they grant to their own nationals to nationals of all the other countries belonging to that Union. The function of WIPO is to administer these Unions.²⁵⁴ Nevertheless, according to the practice of the WIPO, the secretariat provides the member States with “clarification and interpretation of the WIPO convention, WIPO’s General Rules of Procedure, Special Rules of Procedure, working methods, and the mandates of various committees”.²⁵⁵

In addition, during intergovernmental meetings, the Office of the WIPO’s Legal Counsel is responsible for providing member States with clarifications on legal matters, including “the meaning and interpretation of WIPO’s

²⁵⁴ Objectives and functions of WIPO are defined in Articles 3 and 4 of the Convention Establishing the World Intellectual Property Organization, Jul. 14, 1967, 828 U.N.T.S. 3:

“Article 3 Objectives of the Organization

The objectives of the Organization are:

- (i) to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization,
- (ii) to ensure administrative cooperation among the Unions.

Article 4 Functions

In order to attain the objectives described in Article 3, the Organization, through its appropriate organs, and subject to the competence of each of the Unions:

- (i) shall promote the development of measures designed to facilitate the efficient protection of intellectual property throughout the world and to harmonize national legislation in this field;
- (ii) shall perform the administrative tasks of the Paris Union, the Special Unions established in relation with that Union, and the Berne Union;
- (iii) may agree to assume, or participate in, the administration of any other international agreement designed to promote the protection of intellectual property;
- (iv) shall encourage the conclusion of international agreements designed to promote the protection of intellectual property;
- (v) shall offer its cooperation to States requesting legal-technical assistance in the field of intellectual property;
- (vi) shall assemble and disseminate information concerning the protection of intellectual property, carry out and promote studies in this field, and publish the results of such studies;
- (vii) shall maintain services facilitating the international protection of intellectual property and, where appropriate, provide for registration in this field and the publication of the data concerning the registrations;
- (viii) shall take all other appropriate action.”

²⁵⁵ Carolyn Deere Birkbeck, *The World Intellectual Property Organization (WIPO)* 99 (2016).

General Rules of Procedure and the Special Rules of Procedure for various Governing Bodies and Committees”²⁵⁶ and including cases where “requests for votes arise”.²⁵⁷ These rules of procedure do not always reflect the actual practice of the WIPO, which may evolve through interpretation, as a recent guide on the WIPO suggests:

The General Rules of Procedure Rules were last amended in 1979. Meanwhile, the Rules no longer reflect many of the actual practices followed by Member States and the Secretariat. In some instances, Member States have adopted new policies (such as policies on translation and languages) that supersede provisions in the General Rules or the Rules have been effectively ignored by Member States, and/or where the Rules have been overtaken by the practices Member States use. Further, there are many matters on which the Rules are silent or ambiguous.²⁵⁸

Although the WIPO has various mechanisms for oversight and accountability, including the WIPO Independent Advisory Oversight Committee, none of these entities has a specific mandate to review the interpretation of the WIPO constituent instruments by the WIPO secretariat or Legal Counsel.²⁵⁹

e) International Labour Organization

The interpretation of the constituent instruments of the ILO and its mosaic of conventional international labor law has been “a long standing issue within the ILO”.²⁶⁰ Although Article 37(a) of the ILO Constitution positions the ICJ as the authoritative body to interpret the constituent instruments of the ILO, the fragmented structure of the ILO’s decision-making process, amongst other reasons, has prevented such recourse.²⁶¹ Thus, ILO organs, amongst them the ILO’s Committee of Experts on the

²⁵⁶ *Id.*, at 164.

²⁵⁷ *Id.*, at 84.

²⁵⁸ *Id.*, at 84-85.

²⁵⁹ See Generally *Id.*, Ch. 7.

²⁶⁰ See La Hovary, *supra* note 233, at 2.

²⁶¹ See *Id.*, at 3 - 4 (“Despite these important issues, there are furthermore ‘two formidable – and interrelated – obstacles’, again linked to the tripartite structure of the ILO. Indeed, in order to request the ICJ for an advisory opinion, not only would support need to be gathered from a majority of the tripartite Governing Body but the question presented to the Court, approved by the Governing Body, would also need to be drafted in such a way that the answer would be useful to resolve the dispute at hand.”).

Application of Conventions and Recommendations (the “Committee of Experts”), have provided interpretations of the constituent instruments.²⁶²

Beginning in 1989, and increasingly since 2012, groups within the ILO challenged both the mandate of the Committee of Experts to interpret and the Committee’s specific interpretations on the subject of the right to strike.²⁶³ Although the organs of the ILO considered the possibility of requesting that the ICJ render an advisory opinion on various interpretations by the Committee of Experts, decisions on such referrals were ultimately deferred in favor of internal deliberations.²⁶⁴ Hence, it seems that no automatic or compulsory review of the interpretive decisions by the ILO’s Committee of Experts or any other organ exists. Any limitation of the interpretation of the constituent instruments of the ILO is vested in the ILO’s fragmented structure and balance of powers. In practice, neither the ICJ under Article 37(a) nor the independent tribunal under Article 37(b) have been relied upon.

As one of oldest international organizations, the ILO has used the format of a “declaration” as a way of interpreting its constitution. ILO’s Constitution was formulated in 1919. Towards the end of World War Two, the Constitution of the ILO was revisited to make it adaptable to the tasks that it had to perform in a world substantially different from that of 1919. The changes to the ILO Constitution were achieved by the adoption of the Declaration of Philadelphia in 1944, which eventually, in 1946, became an integral part of the ILO Constitution. The Declaration of Philadelphia, while reaffirming the ILO constitutional principles, expands the role of the ILO and its activities from conditions of employment to the function of the labour market, such as employment policies, informality, work productivity, migration, social security, housing, maternity protection, child welfare, etc.; and moves into economic and social policies.²⁶⁵ Again, as a way of adapting its role to the changing circumstance, with the expansion of the role of the ILO, the changing global economy and increase in the establishment of other international organizations whose functions impacted on labour conditions, the ILO adopted the 1998 Declaration on Fundamental Principles and Rights at Work. The 1998 Declaration commits all ILO Member States to respect

²⁶² See La Hovary, *supra* note 233, at 1-3.

²⁶³ *Id.*, at 1, 5; see generally Janice Bellace, *The ILO and the right to strike*, 153 INT’L LABOUR REV. 29 (2014).

²⁶⁴ See La Hovary, *supra* note 233, at 5-7.

²⁶⁵ See Eddy Lee, *The Declaration of Philadelphia: Retrospect and Prospect*, 133 Int’l Lab. Rev. 467, 480 (1994).

the principles in four areas, whether or not they have ratified the specific Conventions from which the principles were drawn. Those four areas are: freedom of association and collective bargaining; the elimination of forced labour, the elimination of child labour; and the elimination of discrimination in respect of employment and occupation. The Declaration also established cooperation with other international organizations in a way that economic and financial issues – including international trade – would be linked to labour issues. The 1998 Declaration employs two strategies in interpreting the ILO Constitution. First, in view of the fact that not many ILO Members had ratified the labour conventions, by declaring and defining the concept of fundamental rights and by proclaiming the obligation of *all* Members of the ILO to respect those principles. The 1998 Declaration is the first time the ILO has used the concept of fundamental rights; intending to give focus to the ILO activities dispersed throughout more than 180 conventions. Second, by strengthening the traditional ILO advisory function and technical cooperation in that respect and by establishing a reporting mechanism.

f) The Interpretation of a “State” for the Purpose of Membership

The various constituent instruments of UN Specialized Agencies include conditions for the admission of members to the organization. Following the formula used for the invitation of States to participate in the 1969 Vienna Convention on the Law of Treaties, later described as the “Vienna formula”,²⁶⁶ the UN Secretary General has interpreted any treaty that is open to “all States” or “any State” shall be open, amongst others, to Member States of UN Specialized Agencies.²⁶⁷ Frederic Kirgis, in 1990, discussing the potential of Palestine’s admission into UN Specialized Agencies, noted that the interpretation of a “State” for the purpose of admission as a member of a UN Specialized Agency may be

²⁶⁶ See Larry Johnson, *Palestine’s Admission to UNESCO: Consequences Within the United Nations?*, 40 DENV. J. INT’L L. & POL’Y 118, 123 (2011). (According to Johnson, “in 1966, when the Assembly decided to convene the Vienna Conference on the Law of Treaties, it invited ‘States Members of the United Nations, States members of the specialized agencies, States Parties to the Statute of the International Court of Justice and States that the General Assembly decides specially to invite’ to participate. The ‘core’ of the invitation (States members of the UN or of the specialized agencies and Parties to the Statute of the ICJ, if not already covered by the prior two categories) subsequently became known as the ‘Vienna formula.’”, *Id.*).

²⁶⁷ *Id.*, at 125.

different than the criteria for recognition of a State under international law, and is subject to the interpretive discretion of each organization:

It is not entirely fanciful to think that a "state" for purposes of admission to a specialized agency might be something other than a "state" for purposes of customary international law. It is generally left to each organ of an intergovernmental organization to interpret those parts of the constituent instrument that apply to its own functions, in the absence of an effective request to an international tribunal or other body to render an authoritative interpretation. If the entity seeking membership is required only to be a "country," or even a "sovereign country," its eligibility probably would not turn on its acquisition of all the elements of a "state" by any definition.²⁶⁸

In an early example, before Namibia obtained its independence, it was represented by the UN Council for Namibia and was accepted as a member of several UN Specialized Agencies, including the ILO.²⁶⁹ The ILO accepted Namibia as a member in spite of the objection of the ILO Legal Advisor, who, in the words of Frederic Kirgis, opposed the decision because "full membership would be improper until Namibia became able to exercise all the rights and discharge all the obligations of membership".²⁷⁰

The recent admission of Palestine as a Member State of UNESCO serves as another example. The Palestinians began seeking membership in UN Specialized Agencies in the late 1980s with the WHO and UNESCO.²⁷¹ However, they were only granted their first membership in a UN Specialized Agency, UNESCO, in 2011. The UNESCO Constitution stipulates that membership in UNESCO is limited to "states", including States not members of the UN, or territories that are not responsible for their international relations subject to the approval of the authority in charge of such relations.²⁷² In October 2011, even before the General Assembly granted Palestine the status of a non-member

²⁶⁸ Frederic L. Kirgis, Admission of "Palestine" as a Member of a Specialized Agency and Withholding the Payment of Assessments in Response, 84 AM. J. INT'L L. 218, 220-221 (1990).

²⁶⁹ *Id.*, at 221.

²⁷⁰ *Id.*

²⁷¹ See Kirgis, *supra* note 268, 218-219; Brett Schaefer, *What Palestinian Membership Means for UNESCO and the Rest of the United Nations*, 4, 2633 BACKGROUND, Dec. 12, 2011, available at http://thf_media.s3.amazonaws.com/2011/pdf/bg2633.pdf [last visited Jan. 7, 2017].

²⁷² UNESCO Constitution, *supra* note 229, at Art. II.

observer State, UNESCO accepted Palestine as a full Member State.²⁷³ In this decision, the General Conference of UNESCO adopted an interpretation of the UNESCO Constitution that allows for the admission as a member of an entity that has not been recognized as a State in accordance with international law. This interpretation was strongly objected to by the United States, which, as a consequence, immediately cut off all funding to UNESCO.²⁷⁴

UNESCO's interpretation of its constituent instrument, coupled with the Secretary General's interpretation of the "Vienna formula", opened the door for Palestine to become a Member State of other UN Specialized Agencies, and perhaps led to the General Assembly's resolution to grant Palestine the status of an observer State.²⁷⁵

In 2009 the "Government of Palestine" declared its acceptance of the jurisdiction of the International Criminal Court (the "ICC"), pursuant to the Rome Statute. This declaration was declared invalid by the Prosecutor of the ICC, amongst other reasons because "Palestine" was an "observer" and not a "non-member State" of the UN and thus it could not sign or ratify the Rome Statute.²⁷⁶ However, pursuant to General Assembly resolution 67/19, which granted Palestine the status of an "observer State", the ICC Prosecutor, although avoiding the question of Palestinian Statehood, noted that:

The test consistently applied by the Office is whether Palestine has the ability to accede to the Rome Statute thereby providing jurisdiction pursuant to article 12(1)-(2) or, in the alternative, lodge a declaration

²⁷³ UN News Center, UNESCO votes to admit Palestine as full member, Oct. 31, 2011, http://www.un.org/apps/news/story.asp?NewsID=40253#.WG4-KrFh0_U.

²⁷⁴ See generally Johnson, *supra* note 266; New York Times, Unesco Accepts Palestinians as Full Members, Oct. 31, 2011, <http://www.nytimes.com/2011/11/01/world/middleeast/unesco-approves-full-membership-for-palestinians.html>; Washington Post, UNESCO votes to admit Palestine; U.S. cuts off funding, Oct. 31, 2011, https://www.washingtonpost.com/world/national-security/unesco-votes-to-admit-palestine-over-us-objections/2011/10/31/gIQAMleYZM_story.html?utm_term=.e17a4504e0d7.

²⁷⁵ See Johnson, *supra* note 266, at 119-122, 123-127 (Johnson, pursuant to the decision to admit Palestine as a member State to UNESCO, suggested that these might be the outcomes of this decision).

²⁷⁶ See THE OFFICE OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2013, § 236, available at <https://www.icc-cpi.int/OTP%20Reports/otp-report-2013.aspx> [last visited Jan. 7, 2017] [hereinafter ICC Report 2013]; see also INTERNATIONAL COURT OF JUSTICE, The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine, Press Release, Jan. 16, 2015, available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1083> [last visited Jan. 7, 2017] [hereinafter ICC Press Release Jan. 16, 2015].

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accepting the jurisdiction of the Court pursuant article 12(3). As explained in the Office's decision of 3 April 2012, in accordance with article 125, the Rome Statute is open to accession by "all States", and any State seeking to become a Party to the Statute must deposit an instrument of accession with the Secretary-General of the United Nations. Since it is the practice of the Secretary-General to follow or seek the General Assembly's directives on whether an applicant constitutes a "State" for the purpose of treaty accession, the Office considers that Palestine's status at the UNGA is of direct relevance to the issue of the Court's jurisdiction.²⁷⁷

On January 1, 2015, the Government of Palestine again declared its acceptance of the jurisdiction of the ICC, and, on January 2, 2015, deposited its instrument of accession to the Rome Statute with the Secretary-General; it entered into force on April 1, 2015.²⁷⁸ The Prosecutor of the ICC, Ms. Fatou Bensouda, accepting as valid the Palestinian accession to the Rome Statute and its declaration of acceptance of the ICC's jurisdiction, launched a preliminary examination of the situation in the occupied Palestinian territory.²⁷⁹ This decision of the Prosecutor of the ICC interpreted the Rome Statute as allowing an entity, not recognized as a State under international law, to be accepted as a party to the Rome Statute and enjoy access to the ICC. The Prosecutor stated that:

The Office considers that, since Palestine was granted observer State status in the UN by the UNGA, it must be considered a "State" for the purposes of accession to the Rome Statute (in accordance with the "all States" formula). Additionally, as the Office has previously stated publicly, the term "State" employed in article 12(3) of the Rome Statute should be interpreted in the same manner as the term "State" used in article 12(1). Thus, a State that may accede to the Rome Statute may also lodge a declaration validly under article 12(3).

For the Office, the focus of the inquiry into Palestine's ability to accede to the Rome Statute has consistently been the question of Palestine's status in the UN, given the UNSG's role as treaty depositary of the Statute. The UNGA Resolution 67/19 is therefore determinative of Palestine's ability to accede to the Statute pursuant to article 125, and equally, its ability to lodge an article 12(3) declaration.²⁸⁰

²⁷⁷ ICC Report 2013, *Id.*, at § 238.

²⁷⁸ INTERNATIONAL CRIMINAL COURT, PRELIMINARY EXAMINATION – PALESTINE, *available at* <https://www.icc-cpi.int/palestine> [last visited Jan 7, 2017].

²⁷⁹ ICC Press Release Jan. 16, 2015, *supra* note 276.

²⁸⁰ *Id.*

The acceptance of Palestine as a party to the Rome Statute was criticized by various States, including Israel, the United States and Canada, all of whom asserted that Palestine was not recognized as a State under international law and thus was ineligible for acceptance as a treaty party.²⁸¹ Objecting to the Prosecutor of the ICC's interpretation of its constituent instrument, the US State Department issued the following statement:

We strongly disagree with the ICC Prosecutor's action today. As we have said repeatedly, we do not believe that Palestine is a state and therefore we do not believe that it is eligible to join the ICC.²⁸²

The Palestinian case is an example of the process of interpretation by international organizations of their constituent instruments. On the question of membership, both UNESCO and the ICC have interpreted the definition of a "State" in their constituent instruments to include an entity which was not recognized as a State under general international law. The examination of acceptance of Palestine as a Member State reveals a broad discretion of international organizations in interpreting the meaning of a "state" for membership. The United States' threat to revoke funding proved ineffective as a tool for limiting UNESCO's interpretation of its constituent instrument. Similarly, the objections of the United States and other countries to Palestine's acceptance into the Rome Statute, failed to curtail the interpretive discretion of the Prosecutor of the ICC. It is also notable that the situation of membership of Palestine was resolved by the organizations concerned and it was not referred to judicial review.

3. Summary Conclusion

Specialized Agencies routinely interpret their constituent instruments internally. In case of a dispute about an interpretation they have different mechanisms for review of internal interpretations of their constituent instruments; where there is consensus among Member States on a particular interpretation of a provision of the constituent instrument, there is no review process. Hence theoretically, there are no limits on the discretionary power of the Specialized Agencies to interpret dynamically their constituent instruments if there is no objection from one or more member States. Where there have been objections and resort has been had

²⁸¹ Laura Smith-Spark, *Palestinians join International Criminal Court, permitting war crimes inquiries*, CNN, Apr. 1, 2015, available at <http://edition.cnn.com/2015/04/01/middleeast/palestinians-icc-membership/> [last visited Jan. 7, 2016].

²⁸² U.S. Department of State, Statement on ICC Prosecutor's Decision, Jan. 16, 2015, available at <https://www.state.gov/r/pa/prs/ps/2015/01/236082.htm> [last visited Jan. 7, 2017].

to judicial review, such as by the ICJ, the VCLT rules appear to have governed the scope of interpretation.

G. World Bank and IMF Interpretation of their Constituent Instruments

The constituent instruments of the International Bank for Reconstruction and Development and the International Monetary Fund (IMF) were adopted at Bretton Woods, New Hampshire on July 22, 1944 to help with reconstruction in Europe after World War II. Today, the World Bank Group is comprised of five affiliated organizations: International Bank for Reconstruction and Development (IBRD); International Development Association (IDA); International Finance Corporation (IFC); Multilateral Investment Guarantee Agency (MIGA); and International Centre for Settlement of Investment Disputes (ICSID). In this Report, we refer to the World Bank meaning the original organization established in 1944 (IBRD). The other four organizations are established by and affiliated with important links to the IBRD.

The World Bank and the IMF are examined separately from other Specialized Agencies because of their special status as financial institutions and because their constituent instruments were drafted in the same period as the Charter.

The constituent instruments of the World Bank and the IMF have been interpreted to adapt them to new circumstances. Some of the interpretations have been fundamental and substantive. The Bretton Woods Agreement empowers the Executive Directors to interpret the Agreement either formally or informally in the course of operations. Article IX(a) and (b) of the World Bank, which is identical to Article XVIII of the IMF, provides:

- a) Any question of interpretation of the provisions of this Agreement arising between any member and the Bank or between any members of the Bank shall be submitted to the Executive Directors for their decision. If the question particularly affects any member not entitled to appoint an Executive Director, it shall be entitled to representation in accordance with Article V, Section 4 (h).
- b) In any case where the Executive Directors have given a decision under (a) above, any member may require that the question be referred to the Board of Governors, whose decision shall be final. Pending the

result of the reference to the Board, the Bank may, so far as it deems necessary, act on the basis of the decision of the Executive Directors.²⁸³

As Ervin Hexner, former Assistant General Counsel of the IMF observes,²⁸⁴ the Executive Directors deal with “any question of interpretation”, and under paragraph (b), any member has a second chance to appeal to the Board of the Governors whose decision is final. Only *disagreements* between the Bank or the IMF and a country which has ceased to be a member, or between the Bank or the IMF and any member during the permanent suspension of the Bank, or liquidation of the IMF may be referred to arbitration. Hexner observed that: “[t]he exercise of the interpretative function aims at determining the meaning of the provisions of the Agreement; the arbitration procedure is supposed to result in an arbitration award settling a specific controversy.”²⁸⁵

Hence only internal organs of the World Bank and IMF are authorized to interpret the constituent instruments of these two institutions. In addition, the informal interpretive competence of the Executive Directors of these institutions in the course of their normal operation has proved significant. The legal advisors of the World Bank, and the IMF in the earlier years of these institutions, Mr. Broches and Mr. Hexner respectively, have expressed the view that powers intentionally vested in the Executive Directors were quasi-legislative and quasi-judicial. With respect to the competence of the Executive Director of the IMF, Mr. Hexner stated:

Its authority to decide on questions of interpretation may be classified as “quasi-judicial”. The determination of board Fund policies and the adaptation of the constituent instrument to changing circumstances frequently appear to require measures which in the absence of a better term may be classified “quasi-legislative”.²⁸⁶

Mr. Broches, General Counsel of the International Bank for Reconstruction and Development and the International Finance Corporation, similarly observed:

²⁸³ Articles of Agreement of the International Bank for Reconstruction and Development, Art. IX (Jun. 27, 2012); Article XVIII of the IMF has now renumbered as Article XXIX.

²⁸⁴ Hexner, *Interpretation*, *supra* note 1, at 345.

²⁸⁵ *Id.*

²⁸⁶ Ervin P. Hexner, *The Executive Board of the International Monetary Fund: A Decision-Making Instrument*, 18 INT’L ORG. 74, 82 (1964) [hereinafter “Hexner, IMF”]. He also observed that the IMF Agreement was “intended to be the basis for a quasi-legislative power which operates in the form of authoritative interpretative decisions.”, Hexner, *Interpretation*, *supra* note 1, at 370.

I think it is fair to say that when the Executive Directors exercise their power of interpretation, their activity has both judicial and legislative elements. The Executive Directors, acting as an interpreting body, are ... free to interpret the provisions of the Articles according to their own discretion.²⁸⁷

The early legal advisors of the World Bank and the IMF explained that the formal and informal interpretive competence of the Executive Boards of these organizations was compatible with the original design and object and purpose of these organizations and the need for their adaptability to the changing circumstances so as to remain relevant. In this regard, Broches stated:

The fact that an operation or transaction is not expressly authorized or contemplated by a specific provision of the Articles, does not mean that the Bank has no power to undertake it. Whether it has or does not have a particular power must be determined in the light of the Bank's purpose, by which all the Bank's decisions must be guided. For on finding that the Bank has such power, the power need not be shown to be necessarily or even reasonably implicit in any power given expressly by the Articles. It is enough that its exercise may further the achievement of the Bank's purposes, and that it is not prohibited by or inconsistent with the Bank's Articles of Agreement.²⁸⁸

A similar view was expressed by Hexner on the interpretative competence of the Executive Board of the IMF:

The Board has used effectively its far-reaching interpretative jurisdiction to soften the conceptual rigidity of the Fund Agreement. This approach of making rigid provisions more flexible through interpretation has been expressly or tacitly approved by the member states. The annual reports provide plenty of examples of bold interpretations, which transcend the intentions of the founding fathers, involving a radical expansion of the Fund's financial operation and of the institution of the Fund policies in regard to monetary behavior of member states.²⁸⁹

Hexner further observed that:

[A]rrangements for final interpretation by non-judicial bodies were the result of a give-and-take process carried out in a series of complex international negotiations. The negotiations preceding [Bretton Wood Conference] were undertaken mainly by monetary experts [who] wished to keep decision-making on delicate policy issues involving

²⁸⁷ Aron Broches, *International Legal Aspects of the Operation of the World Bank*, 98 RECUEIL DES COURS 299, 313 (1959).

²⁸⁸ *Id.*, at 336.

²⁸⁹ Hexner, IMF, *supra* note 286, at 92.

interpretation in the hands of financial experts. They also wished to create a framework within which the principal policies of the institutions could be evolved with due consideration to the balance of interests indicated by the different quotas. Furthermore, they aimed at the creation of a constitutional framework which would not preclude the adjustment of policies to changing political and economic circumstances.²⁹⁰

Article I of the constituent instruments of both the World Bank and the IMF defines their purposes. For the World Bank, five general purposes have been listed and for the IMF six general purposes have been listed. Both Articles end with a proviso stating that the World Bank and IMF shall be guided in all their decisions by those purposes.²⁹¹

The intentions of the parties are found in Article I of the Agreement setting forth the *purposes* of the IMF or the World Bank.²⁹² It appears that early legal advisors of the two institutions saw an expanded competence for interpretation of the means by which those purposes could be achieved. In addition, these organizations have developed principles and policies in the course of their operation and “they constitute internal law ... which would be applied in interpretative decisions.”²⁹³ Hexner observes that the interpreter is bound within the parameters of public international law:

Those persons who decide on questions of interpretation are acting within the domain of the law of nations and are bound by the provisions of public international law.²⁹⁴

²⁹⁰ Hexner, *Interpretation*, *supra* note 1, at 344.

²⁹¹ Articles of Agreement of the World Bank, *supra* note 283, at Art. I, read: “The Bank shall be guided in all its decisions by the purposes set forth above.” And Article I of the Articles of Agreement of the IMF read: “The Fund shall be guided in all its policies and decisions by the purposes set forth in this Article.” This proviso has been interpreted as providing a wider scope of competence for interpretation. Jan Klabbbers states that: “[A]n important branch of international legal scholarship feels that there are good grounds to exclude some treaties from the straitjackets of the general rule, and instead adopt a more goals-oriented mode of interpretation. Some constitutions make this explicit: Article I IMF, for example, stipulates that the IMF ‘shall be guided in all its policies and decisions by the purposes’ mentioned in the same article, and Article I IBRD makes the same point in almost identical language.”

Jan Klabbbers, *An Introduction to International Organizations Law* 83 (3rd ed., 2015) [citations omitted].

²⁹² Hexner, *Interpretation*, *supra* note 1, at 349.

²⁹³ *Id.*, at 350.

²⁹⁴ *Id.*

As to the limits of the interpretative power, Hexner believes that interpretation should not amount to amendment which is covered by another provision, involving other participants and procedures. But he sees the difficulty of drawing such a boundary which has to be done by those who make the interpretation:

The question may be asked whether the interpretative power includes the right to determine the limits of the interpretative power, and whether it extends to interpretation of provision relative to amendments of the Agreement (Article XVII). The answer to this question is in the affirmative, subject, of course, to the fact that matters touching on *compétence de la compétence* frequently border on political aspects and involves problematical elements of *ultra vires* actions.²⁹⁵

The constituent instruments of the IMF and Bank do not provide for judicial control, in its traditional sense, of the interpretation of the Articles of these institutions because their effective operation depends on international cooperation.²⁹⁶ However, this does not mean the absence of good faith and reasonableness in interpretation.²⁹⁷

For Hexner, one of the fascinating functions of the Executive Directors was the “adaptation of Fund [IMF] Policies and practices to changing circumstances, in view of the many inflexible provisions of the Fund Agreement”.²⁹⁸ He observed that “[i]n the Fund, ..., interpretation often involves lawmaking, and this on a much broader basis than that on which judicial lawmaking operates in the framework of a modern national government.”²⁹⁹

A similar but more cautious view was expressed by Ibrahim Shihata, a later General Counsel of the World Bank. He observed:

the interpretation function, while it always should be subject to a correct legal approach, is also meant to be responsive to the needs of the institution and its members as a whole. It should therefore combine strictly sound legal analysis with considerations related to the business

²⁹⁵ *Id.*

²⁹⁶ *Id.*, at 367.

²⁹⁷ Hexner observed that: “It would be far-fetched to imply from the absence of ‘judicial redress’ and the unavoidable balancing of interests which is inherent in the interpretative machinery of the Fund, that the rule of law, especially the principles of good faith and reasonableness, was not intended to apply in the rendering of interpretative decisions. It would also be far-fetched to state that for the purposes of international monetary administration the interpretative system of the Fund is a perfect substitute for an independent judicial agency.” *Id.*

²⁹⁸ Hexner, IMF, *supra* note 286, at 79.

²⁹⁹ Hexner, *Interpretation*, *supra* note 1, at 370.

exigencies of the organization, where the efficiency of the institution in achieving its purposes and its continued relevance to the needs of its members are important factors to be taken into account.³⁰⁰

Shihata went on to explain how the legal advisor of the Bank interprets the Articles of the Agreement of the Bank, selecting from the language of Articles 31 and 32 of the Vienna Convention but without entirely committing himself to those provisions, rather using them more as a starting point:

The General Counsel's clarifications of the meaning and implications of the Articles have carefully studied the *travaux préparatoires* in an attempt to identify the intended meaning. But they have accorded greater attention to the ultimate objective of the Articles and the overall mandate of the Bank. There was no attempt to adhere to a subjective (intentionist) interpretation. Interpretations have rather served the purposes of the Bank as an international institution concerned with the reconstruction and development of its members: a financier of investment for productive purposes, and a facilitator of international investment and trade. They have enabled the Bank to address many areas related to the economic development of its borrowing countries that were not deemed to be so related at the time the Articles of Agreement were drafted.³⁰¹

Another Bank General Counsel, Roberto Dañino Zapata, seemed to find that the concerns expressed by the Bank during the drafting of the Vienna Convention on the Law of Treaties still hold true as the reason for the Bank not becoming party to the Vienna Convention on the Law of Treaties:

When the codification process was still under way, the Bank flagged two main reasons for concern. The first one was "the possibility that a problem of validity or of interpretation of an international agreement would receive a different solution depending on whether the agreement was subject to the Vienna Convention or to customary international law". The second one was the Bank's preoccupation that certain provisions (such as those on the invalidity, termination and suspension of treaties) would be ill suited to long-term financial agreements.³⁰²

³⁰⁰ Ibrahim Shihata, *The Dynamic Evolution of International Organizations: The Case of the World Bank*, 2 J. HIST. INT'L L. 217, 222-3 (2000) [hereinafter "Shihata, Dynamic Evolution"].

³⁰¹ *Id.*, at 225.

³⁰² Roberto Dañino Zapata, WHY TREATIES MATTER (Opening Remarks - First Annual Conference "Interpretation Under the Vienna Convention On the Law of Treaties - 25 Years On"), 9 (Jan. 17, 2006), available at <http://siteresources.worldbank.org/INTLAW/JUSTICE/214576-1139604306966/20817203/WhyTreatiesMatterLondon011706.pdf> [last visited Dec. 11, 2016].

Through the seventy years of their existence, the scope of operation and the mandates of the World Bank and the IMF have expanded significantly. Today the World Bank is viewed as a financial development institution dedicated to fighting poverty by offering financial and technical assistance to developing countries both in the private and public sectors. But this was not the primary mission at the time of the creation of these institutions.³⁰³ The authority for the interpretation has been achieved by interpreting the constitutive instruments of these organizations internally including by the Executive Directors.

Among the substantive interpretations transforming the goals of the World Bank has been, for example, supporting projects inspired by political reform and enhancing education and other measures and safety social nets to reduce poverty in developing countries.³⁰⁴ Roberto Dañino Zapata saw human rights as being included in the evolving notion of development; he wrote that “the Bank would not run afoul of the political prohibitions of the Articles by taking human rights into account.”³⁰⁵

³⁰³ Sandra Blanco and Enrique Carrasco have observed that:

“Today the World Bank is at the center of many conversations regarding international finance and development. But at the Bretton Woods Conference, creating the World Bank was an afterthought – and even the participants did focus on it, ‘development’ was not their primary concern ...[and] relatively little time was devoted to discussing the plight of ‘developing countries’.”

Sandra Blanco & Enrique Carrasco, Pursuing the Good Life: The Meaning of Development as it Relates to the World Bank and the IMF, 9 TRANSNAT’L. L. & CONTEMP. PROBS. 67, 70-72 (1999). See also Ronald Janse, (Why) Was the World Bank Supposed to be a Nonpolitical Organization? An Interpretation of the Original Meaning and Rationale of Article 4(10) of the Articles of Agreement of the International Bank for Reconstruction and Development, 1941-1948, 16 J. HIST. INT’L L. 113, 130-131 (2014). Maria Rosaria Mauro also observes that the evolution of the World Bank has been done “essentially through practice and without specific statutory changes, even though the provisions of the Articles of Agreement have been the subject of different interpretations over time, formal and informal, explicit and implicit, which allowed an extension of the activities of the Bank.” Maria Rosaria Mauro, The Protection of Non-Economic Values and the Evolution of International Economic Organizations: The Case of the World Bank, in EVOLUTIONS IN THE LAW OF INTERNATIONAL ORGANIZATIONS 244, 252 (Roberto Virzo & Ivan Ingravallo eds., 2015).

³⁰⁴ See Shihata, *Dynamic Evolution*, *supra* note 300, at 245; Nicolas H. Moller, *The World Bank: Human Rights, Democracy and Governance*, 15 NETH. Q. HUM. RTS. 21, 30 (1997); see also Ibrahim Shihata, *The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements*, 17 DENV. J. INT’L L. & POL’Y 39, 50 (1988) [hereinafter “Shihata, *Legal Issues*”]

³⁰⁵ Roberto Dañino Zapata, *The Legal Aspects of the World Bank’s Work on Human Rights*, 41 INT’L LAWYER 21, 24 (2007). See also, Shihata, *Legal Issues*, *Id.*; Siobhan McInerney-Lankford, *International Financial Institutions and Human Rights: Selected*

Considerations of good governance and anti-corruption and environmental impacts of the projects financed by the Bank have also been the result of interpretation of its constituent instrument by means of affecting the terms of the lending agreements with the Bank and the monitoring mechanisms in place.³⁰⁶

The interpretation of the constituent instruments of the World Bank by its Executive Directors also led to institutional changes. The four affiliates of the Bank were established by decisions of the Executive Directors: The International Finance Corporation (IFC) in 1956; the International Development Association (IDA) in 1960; the International Centre for Settlement of Investment Disputes (ICSID) in 1966; and the Multilateral Investment Guarantee Agency (MIGA) in 1988.³⁰⁷

The UN General Assembly authorizes the IMF, the World Bank and the IFC (through the World Bank) to request advisory opinions from the ICJ on any legal question within the scope of their activities. But Hexner observes that:

Apart from very uncommon and refined questions which may arise in the application of certain provisions of the Convention on Privileges and Immunities of the Specialized Agencies, it is difficult to conceive of cases in which the three organizations would resort to requesting the advisory opinion of the International Court of Justice on questions of interpretation. The internal procedure of interpretation [in these organizations] is obligatory and cannot be affected by the organizations' right to request advisory opinions.³⁰⁸

In a case before the ICJ where the parties offered differing interpretations of some Articles of the IMF, they recognized that only the IMF was competent to render an authoritative interpretation of the

Perspectives on Legal Obligations, in *INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW* 239 (Daniel D. Bradlow & David B. Hunter eds., 2010).

³⁰⁶ See Andres Rigo Sureda, *The World Bank and Institutional Innovation*, 31 *STUD. TRANSNAT'L LEGAL POL'Y* 11, 15 (1999); Ibrahim Shihata, "The World Bank and "Governance" Issues in Its Borrowing Members", in *THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS AND LECTURES*, 53-59 (Ibrahim Shihata ed., 1995); Ibrahim Shihata, *The World Bank and the Environment: a Legal Perspective*, 16 *MD. J. INT'L L.* 1, 2-8, 13-19 (1992). See also Gunther Handl, *The Legal Mandate of Multilateral Development Banks as Agents of Change Toward Sustainable Development*, 92 *AM. J. INT'L L.* 642, 648-51 (1998).

³⁰⁷ Maurizio Ragazzi, *World Bank Group*, in *The Max Planck Encyclopedia of Public International Law*, Vol. X, 909-910 (2012).

³⁰⁸ Hexner, *Interpretation*, *supra* note 1, at 346.

provisions of the Articles of Agreement of the Fund.³⁰⁹ The ICJ's Judgment did not address the question.

V. The Practice of the International Court of Justice

A. *Advisory Opinions*

In the earliest years of its existence, the ICJ invoked its status as the “principal judicial organ” of the United Nations to find the task of interpreting the Charter as “an interpretative function which falls within the normal exercise of its judicial powers.”³¹⁰ Thus, in the *Admissions Conditions* Advisory Opinion, the ICJ found itself competent to interpret the “conditions” enumerated in Article 4(1) of the Charter, because “[t]o determine the meaning of a treaty provision--to determine, as in this case, the character (exhaustive or otherwise) of the conditions for admission stated therein--is a problem of interpretation and consequently a legal question.”³¹¹

Reflecting what would become the “General Principle” of treaty interpretation by the VCLT, the *Admissions Conditions* Court found that the text of Article 4(1) clearly enumerated an exhaustive list of conditions and left no room for Member States to conjoin additional procedural conditions at a later date.³¹² Crucially, the ICJ held that “the political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute *limitations on its powers or criteria for its judgment*. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution.”³¹³ Some provisions, the Court continued, permit a

³⁰⁹ Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States), Judgment, 1952 I.C.J. Rep. 176 (Aug. 27, 1952). For the French pleading see the Oral Pleadings, at 200, and 308-309 and the American pleadings, at 261.

³¹⁰ Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, 1948 I.C.J. Rep. 57, 61 (May 28).

³¹¹ *Id.*, This holding was not unanimous. Judge Alvarez, for example, faulted the Court for failing to appreciate the “new” international law, and to sufficiently appreciate that “the constitutional Charter cannot be interpreted according to a strictly legal criterion; another and broader criterion must be employed and room left, if need be, for political considerations,” *Id.*, at 70 (individual opinion of Judge M. Alvarez).

³¹² *Id.*, at 63 (“The Court considers that the text is sufficiently clear; consequently, it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself.”)

³¹³ *Id.*, at 64. (emphasis added)

“wide liberty of appreciation,” but in all instances the first inquiry is into the degree of discretion permitted by the text.³¹⁴

But the ICJ has also embraced the proposition that some powers are properly implied by the constituent instrument’s assignment of particular objectives and duties to an international organization. Thus, in the 1949 *Reparations* Advisory Opinion, the ICJ was called upon by the General Assembly to render an advisory opinion on whether an agent of the UN may “bring an international claim against the responsible ... government with a view to obtaining the reparation due” to both the agent and the organization.³¹⁵ In contrast to the *Use of Nuclear Weapons in Armed Conflict* (which is discussed below), there was no question as to whether the request for an opinion “arose within the scope” of the organization’s constitutive instrument, since Article 96(1) of the Charter permits the General Assembly and Security Council to pose “any legal question” to the ICJ. Instead, the ICJ had to decide whether a power “which is not settled by the actual terms of the Charter” could be inferred based on “what characteristics w[ere] intended” by those terms.³¹⁶

In looking to the intent of the ratifying parties, the ICJ filled a lacuna in the law of State responsibility as applied to a nascent UN: although the Charter was silent on the issue, the *Reparation for Injuries* Court concluded, *inter alia*, that the UN possessed the requisite international personality to exercise diplomatic protection of its agents and could thus bring claims for reparations against States. The ICJ held that “[u]nder international law, [an] Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.”³¹⁷ Pierre-Marie Dupuy has argued that the *Reparations* decision demonstrates that “[t]he ICJ has already evinced a tendency to act less like a loyal servant to the individual intention of parties, and more like an artisan with a dynamic vision of the common design.”³¹⁸

The ICJ also found an implied power in the UN General Assembly to establish an administrative tribunal that could settle disputes between the

³¹⁴ *Id.*

³¹⁵ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. 174, 175 (Apr. 11).

³¹⁶ *Id.*, at 178.

³¹⁷ *Id.*, at 182.

³¹⁸ Pierre-Marie Dupuy, *Evolutionary Interpretation of Treaties*, in ENZO CANNIZZARO, *THE LAW OF TREATIES: BEYOND THE VIENNA CONVENTION* 132 (2011).

UN organs and its staff.³¹⁹ Not only did the ICJ find that such a “power to establish a tribunal” arises “by necessary intendment out of the Charter,”³²⁰ but it also held that the tribunal’s compensatory awards could bind the General Assembly and the Secretary General notwithstanding the General Assembly’s express powers to, *inter alia*, “consider and approve the budget of the organization” or the Secretary General’s enumerated “Charter powers” to deal with staff matters.³²¹

Despite its repeated invocation of the VCLT, following its adoption in 1969, as the first port of call in interpreting the Charter and other constituent instruments, the ICJ has suggested that such treaties “raise specific problems of interpretation” in light of their twin character as both “conventional” and “institutional.”³²² Without explicitly announcing a significant departure from the “formal standpoint” of the VCLT framework, the ICJ suggested in the *Use of Nuclear Weapons in Armed Conflict* Advisory Opinion that “the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.”³²³

Following a request by the World Health Assembly pursuant to Article 96(2) of the Charter, the ICJ rendered an advisory opinion, on July 8, 1996, on the question of whether “the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution”. In support of its request for an advisory opinion, the WHO’s request had invoked, *inter alia*, its “role ... as defined in its Constitution to act as the directing and coordinating authority on international health work,” and its authority to “take all necessary action to attain the objectives of the Organization.”³²⁴ In its arguments before the ICJ, the organization noted that the resolution authorizing the request for an advisory opinion had been adopted by a majority of States, and accordingly must be “presumed to have been

³¹⁹ Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. Rep. 47 (July 13).

³²⁰ *Id.*, at 57.

³²¹ *See Id.*, at 59-60.

³²² Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. Rep. 66, 75 (Jul. 8) [hereinafter “ICJ, *Use of Nuclear Weapons*”].

³²³ *Id.*

³²⁴ *See Id.*, at 67.

validly adopted.”³²⁵ In short, the WHO’s request for interpretation contained within it an auto-interpretation of its constitutional competence to pose the fraught question of whether the use of nuclear weapons by States breaches international law.

Before we consider the Court’s Advisory Opinion, it is useful to briefly review the process of adoption of the resolution in the World Health Assembly which requested the Advisory Opinion. When the question of request for the Advisory Opinion was raised and discussed at the World Health Assembly, some States opposed it, including the Permanent Members of the Security Council. During the discussion, the Legal Counsel of the WHO expressed two concerns about the request. First, he did not believe that the question fell within the scope of activities and constitutional authority of the WHO and, second, the question infringed upon the constitutional authority of another organization, the UN General Assembly and the Security Council.³²⁶ These concerns were shared by a number of States, including the Permanent Members of the Security Council. During the consideration of the issue, the United States made a procedural move to the effect that the question formulated for the Advisory Opinion was not within the scope of the activities of the WHO as provided for in paragraph 2 of Article X of the Agreement of 10 July

³²⁵ *See Id.*, at 82 (citing Legal Consequences of the Continued Presence of South Africa in Namibia, Advisory Opinion, 1971 I.C.J. Rep. 22 (Jun. 21)).

³²⁶ Dr. Piel, the Legal Counsel of the WHO said: “Whether the use of nuclear weapons is legal or illegal is a question that does not so readily fit the 22 constitutional functions of WHO under Article 2 or the 13 Health Assembly functions under Article 18. It is not for the Legal Counsel or the Secretariat to decide such a question for the Health Assembly, which has ultimate authority to determine its own competence.

There are times when other organizations risk encroaching on the constitutional authority of WHO in setting international health policy or acting as a directing and coordinating authority on international health work. Conversely, we must respect the original mandates of the other bodies in the United Nations system. This is a matter that has been stressed by both the Director-General of WHO and the Secretary-General of the United Nations. Consequently, it might be considered better if the matter of the legal status of the use of nuclear weapons were handled in such a way that the question was raised through the forums of the United Nations. ...

As Legal Counsel to the Director-General in this Organization I have to share with you my grave concerns about this question of mandate and competence of WHO. My considered opinion is that the matter is too complicated, and risks serious embarrassment and overlap within the United Nations system for the Health Assembly to decide on the matter this year. Therefore, I would suggest that you consider not adding this supplementary item to the agenda of your Health Assembly at this time.”

World Health Org. [WHO], Forty-Fifth World Health Assembly, Verbatim Records of Plenary Meetings, WHO Doc. WHA45/1992/REC/2, at 223-224 (1992).

1948 between the UN and the WHO. The United States' motion was rejected in a secret ballot by 62 votes to 38 with 3 abstentions.³²⁷ Both the rejection of the United States' motion and the passage of the decision to submit the question to the Court were taken by a majority present and voting but not a majority of the membership; none of the Permanent Members of the Security Council supported the decision. The absence of the Permanent Members and internal squabbling among members on the constitutional competence of the WHO to make such a request for an advisory opinion may not have been lost on the ICJ.

The ICJ began its Advisory Opinion with an expression of confidence in its authority under the Charter to render an advisory opinion and the capacity of duly authorized Specialized Agencies to request advisory opinions, but paused to assess two additional jurisdictional requirements: whether the question presented by the WHO was "legal" rather than political, and whether the question presented arose "within the scope of the activities" of the WHO.³²⁸ The ICJ had settled on this jurisdictional inquiry following a series of requests for its review of decisions of administrative tribunals in the preceding decades. To abbreviate that history, the ICJ decided that it will entertain requests for advisory opinions by authorized Specialized Agencies only if the questions presented are "legal" and "aris[e] within the scope of the activities of the requesting organ"³²⁹ – unless the request issues from the General Assembly or the Security Council.³³⁰

³²⁷ World Health Org. [WHO], Forty-Sixth World Health Assembly, Summary Records and Reports of Committees, WHA46/1993/REC/3, at 264 (1993).

³²⁸ *Id.*, at 71–72.

³²⁹ See Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, 1982 I.C.J. Rep. 325, 333 – 334 (Jul. 20).

³³⁰ See *Id.* at 333. Indeed, the General Assembly also requested an advisory opinion pursuant to Article 96(1) on the question of whether the "threat or use of nuclear weapons in any circumstance [is] permitted under international law." The Court decided:

"For the Court to be competent to give an advisory opinion, it is thus necessary at the outset for the body requesting the opinion to be "authorized by or in accordance with the Charter of the United Nations to make such a request". The Charter provides in Article 96, paragraph 1, that: "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."

Some States which oppose the giving of an opinion by the Court argued that the General Assembly and Security Council are not entitled to ask for opinions on matters totally unrelated to their work. They suggested that, as in the case of organs and agencies acting under Article 96, paragraph 2, of the Charter, and notwithstanding the difference in wording between that provision and paragraph 1 of the same Article, the General

These jurisdictional inquiries represent the ICJ's resolution of a number of early objections to its exercise of advisory jurisdiction over matters that might also be considered to be "contentious." As the ICJ explained in 1973, "If a request for advisory opinion emanates from a body duly authorized in accordance with the Charter to make it, the Court is competent under Article 65 of its Statute to give such opinion on any legal question arising within the scope of the activities of that body. The mere fact that it is not the rights of States which are in issue in the proceedings cannot suffice to deprive the Court of a competence expressly conferred on it by its Statute."³³¹

In its 1973 Advisory Opinion on *Review of Judgment No. 158 of the United Nations Administrative Tribunal*, the ICJ took a broader, functionalist view of what it means for activities to "arise within the scope"

Assembly and Security Council may ask for an advisory opinion on a legal question only within the scope of their activities.

In the view of the Court, it matters little whether this interpretation of Article 96, paragraph 1, is or is not correct; in the present case, the General Assembly has competence in any event to seise the Court. Indeed, Article 10 of the Charter has conferred upon the General Assembly a competence relating to "any questions or any matters" within the scope of the Charter. Article 11 has specifically provided it with a competence to "consider the general principles ... in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments". Lastly, according to Article 13, the General Assembly "shall initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification".

12. The question put to the Court has a relevance to many aspects of the activities and concerns of the General Assembly including those relating to the threat or use of force in international relations, the disarmament process, and the progressive development of international law. The General Assembly has a long-standing interest in these matters and in their relation to nuclear weapons. This interest has been manifested in the annual First Committee debates, and the Assembly resolutions on nuclear weapons; in the holding of three special sessions on disarmament (1978, 1982 and 1988) by the General Assembly, and the annual meetings of the Disarmament Commission since 1978; and also in the commissioning of studies on the effects of the use of nuclear weapons. In this context, it does not matter that important recent and current activities relating to nuclear disarmament are being pursued in other fora.

Finally, Article 96, paragraph 1, of the Charter cannot be read as limiting the ability of the Assembly to request an opinion only in those circumstances in which it can take binding decisions. The fact that the Assembly's activities in the above-mentioned field have led it only to the making of recommendations thus has no bearing on the issue of whether it had the competence to put to the Court the question of which it is seised."

The Legality of the Threat of use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 232 – 233 (Jul. 8)

³³¹ Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, 1973 I.C.J. Rep. 166, 172 (Jul. 12).

of the requesting body. In that case, the Court rejected the objection that the “activities” of a Committee established and empowered by the General Assembly to review administrative judgments will be too narrow to permit the ICJ to opine on the activities of another organ, the UN Administrative Tribunal.

The ICJ dispensed with the objection that requests for advisory opinions by administrative tribunals should be confined to narrow workaday procedural matters; rather the organ’s “activities ... have to be viewed in the larger context of the General Assembly’s function ... of which they form a part.”³³² Because, the ICJ continued, the Committee’s requests for advisory opinions will be based on applications that pose a “substantial basis” for review, the legal questions contained within those applications will in turn “arise out of th[e] primary function of screening applications presented to it.”³³³ In a passage that would echo in the ICJ’s *Nuclear Weapons* jurisprudence, the ICJ explained that “there is nothing [in the instruments conferring jurisdiction for advisory opinions to questions] which requires that the replies to the questions should be designed to assist the requesting body in its own future operations or which makes it obligatory that the effect to be given to an advisory opinion should be the responsibility of the body requesting the opinion.”³³⁴ Accordingly, the ICJ could entertain a request for an advisory opinion by a committee of review, even though the opinion would touch and concern the activities of another organ such as the UN Administrative Tribunal.

Addressing the requirements that questions presented for advisory opinions be “legal” and “arise within the scope” of organization’s activities, the *Nuclear Weapons* Court quickly concluded that the question posed by the WHO was “legal,” insofar as it was “framed in terms of law and rais[ed] problems of international law,”³³⁵ and that the “political aspects” and “motives” of the question were merely incidental to the proper legal question before it.

³³² *See Id.*, at 174.

³³³ *Id.*

³³⁴ *Id.*, at 175. The Court concluded that:

“23. ... the Committee on Applications for Review of Administrative Tribunal Judgements is an organ of the United Nations, duly constituted under Articles 7 and 22 of the Charter, and duly authorized under Article 96, paragraph 2, of the Charter to request advisory opinions of the Court for the purpose of Article 11 of the Statute of the United Nations Administrative Tribunal. It follows that the Court is competent under Article 65 of its Statute to entertain a request for an advisory opinion from the Committee made within the scope of Article 11 of the Statute of the Administrative Tribunal.”

³³⁵ ICJ, *Use of Nuclear Weapons*, *supra* note 322, at 73.

As for the second requirement, the ICJ dwelled for some time on the issue of whether the WHO's request arose "within the scope" of its activities. The question, the ICJ explained, required it to turn to "the relevant rules of the organization and, in the first place, to its constitution."³³⁶ The ICJ stated that as a "formal" matter, such constitutions are "treaties" to which "the well-established rules of treaty interpretation apply,"³³⁷ In this light, the ICJ began by examining the text of the Constitution of the WHO, including its preamble, in an analysis following VCLT Articles 31 and 32. The Court concluded that: "Interpreted in accordance with their ordinary meaning, in their context and in the light of the object and purpose of the WHO Constitution, as well as of the practice followed by the Organization, the provisions of its Article 2 may be read as authorizing the Organization to deal with the effects on health of the use of nuclear weapons, or of any other hazardous activity, and to take preventive measures aimed at protecting the health of populations in the event of such weapons being used or such activities engaged in."³³⁸

The ICJ then examined whether the question as formulated fell within the meaning of Article 2 of the WHO Constitution. Here again the ICJ's analysis is drawn from the VCLT's language:

The question put to the Court in the present case relates, however, *not to the effects* of the use of nuclear weapons on health, but to the *legality* of the use of such weapons *in view of their health and environmental effects*. Whatever those effects might be, the competence of the WHO to deal with them is not dependent on the legality of the acts that caused them. Accordingly, it does not seem to the Court that the provisions of Article 2 of the WHO Constitution, interpreted in accordance with the criteria referred to above, can be understood as conferring upon the Organization a competence to address the legality of the use of nuclear weapons, and thus in turn a competence to ask the Court about that.³³⁹

The ICJ then examined previous resolutions and work of the WHO and found only minor and insignificant references therein to matters that might be relevant to the question before the ICJ.³⁴⁰

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*, *supra* note 322, at § 21.

³³⁹ *Id.* (Italics original).

³⁴⁰ *Id.*, at § 23. In paragraph 27 of the Advisory Opinion the Court considered the past practice of the WHO again and concluded: "A consideration of the practice of the WHO bears out these conclusions. None of the reports and resolutions referred to in the

CONSTITUTION AND STATUTES OF INTERNATIONAL ORGANIZATIONS

Having examined the Constitution of the WHO as an ordinary treaty subject to the interpretive rules of the VCLT, the ICJ then examined whether its interpretation would be affected by the fact that the treaty before it is the constituent instrument of an international organization:

The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the "principle of speciality", that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.

...

The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as "implied" powers³⁴¹.

The ICJ also distinguished *intra vires* interpretation, for which the ICJ implied that it has certain authority, from decisions made in accordance with the rules of the procedure of an international organization which may or may not carry the same authority. While not explicitly stated, here it becomes apparent that the absence of a significant number of States during the vote, the opposition of many States to the resolution including the opposition of the Permanent Members of the Security Council, and the concern for trespassing on the competence of another international organization were not lost on the ICJ:

It has thus been argued that World Health Assembly resolution WHA46.40, having been adopted by the requisite majority, "must be presumed to have been validly adopted" (cf. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, I.C.J. Reports 1971, p. 22, para. 20). The Court

Preamble to World Health Assembly resolution WHA46.40, nor resolution WHA46.40 itself, could be taken to express, or to amount on its own to a practice establishing an agreement between the members of the Organization to interpret its Constitution as empowering it to address the question of the legality of the use of nuclear weapons, nor can, in the view of the Court, such a practice be inferred from isolated passages of certain resolutions of the World Health Assembly cited during the present proceedings." *Id.*, at § 27.

³⁴¹ *Id.*, at § 25.

would observe in this respect that the question whether a resolution has been duly adopted from a procedural point of view and the question whether that resolution has been adopted *intra vires* are two separate issues. The mere fact that a majority of States, in voting on a resolution, have complied with all the relevant rules of form cannot in itself suffice to remedy any fundamental defects, such as acting *ultra vires*, with which the resolution might be afflicted.³⁴²

The question remains, as to whether the ICJ's analysis would have been different had the WHO resolution been adopted by a significant majority of the Member States and without the opposition of the Director-General of the WHO, its Legal Counsel or the Permanent Members of the Security Council, and if no parallel question had been asked by the General Assembly. The ICJ made clear that *intra vires* interpretation required elements more than compliance with procedural rules of an international organization.

The ICJ's ultimate approach appears to authorize a more fulsome consideration of "subsequent practice in the application of the treaty" than might otherwise have been appropriate, since, the ICJ intimated, such consideration helps to determine whether an organization's action "arises 'within the scope'" of the organization's constitutive instruments.³⁴³ In the ICJ's words:

[T]he constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.³⁴⁴

³⁴² *Id.*, at § 29.

³⁴³ *Id.*, at § 19.

³⁴⁴ *Id.* In 1960, in an advisory opinion requested by the International Maritime-Consultative Organization with respect to the interpretation of Article 28(a) of its Constitution, the Court's analysis does not seem to ascribe any particular importance to the fact that it is interpreting the Constitution of an international organization for which the Organization has special powers:

"This interpretation accords with the structure of Article. Having provided that "not less than eight shall be the largest ship-owning nations", the Article goes on to provide that the remainder shall be elected so as to ensure adequate representation of "other nations"

That said, despite sounding a few notes suggestive of the idea that constitutive instruments ought to be interpreted in a fashion that is reflective of the “intrinsically evolutionary” character of such treaties, the Court found that “the matter is generally governed by Articles 31 and 32 of the 1969 Vienna Convention.”³⁴⁵

The ICJ ultimately found that, “[i]nterpreted in accordance with their ordinary meaning, in their context and in the light of the object and purpose of the WHO Constitution, as well as of the practice followed by the Organization,” the WHO’s scope of activities included “deal[ing]” with the *effects* of nuclear weapons, such as “taking preventive measures” to mitigate those effects, but the scope of activities did not include the competence to address the “*legality* of the acts that caused” such effects.³⁴⁶ In sum, the ICJ found that there was no “sufficient connection” to the organization’s mandate to address the effects of nuclear weapons because “[w]hether nuclear weapons are used legally or illegally, their effects on health would be the same.”³⁴⁷

In the San Francisco *travaux* of the Charter is the germ of the idea that express provisions empowering organizations to interpret their constituent instruments are unnecessary because the interpretive “process is inherent in the functioning of any body which operates under an instrument defining its functions and powers.” But what it might mean for such a power to “inhere” in an organization – or how “inherent” or “implied” powers might be limited – remains ill-defined.

with an important interest in maritime safety-nations other than the eight largest ship-owning nations, "such as nations interested in the supply of large numbers of crews" etc., as contrasted with "the largest ship-owning nations". The use of the words "other nations" and "such as" in their context confirms this interpretation.

The argument based on discretion would permit the Assembly, in use only of its discretion, to decide through its vote which nations have or do not have an important interest in maritime safety and to deny membership on the Committee to any State regardless of the size of its tonnage or any other qualification. The effect of such an interpretation would be to render superfluous the greater part of Article 28 (a) and to erect the discretion of the Assembly as the supreme rule for the constitution of the Maritime Safety Committee. This would in the opinion of the Court be incompatible with the principle underlying the Article.”

ICJ, *Maritime Safety*, *supra* note 251, at 160.

³⁴⁵ Philippe Sands & Pierre Klein, *Bowett’s Law of International Institutions* 454-55 & n.32 (6th ed. 2009).

³⁴⁶ ICJ, *Use of Nuclear Weapons*, *supra* note 322, at § 21.

³⁴⁷ *Id.*, at § 22.

The ICJ returned to the principle of implied powers, first enunciated in the *Reparation for Injuries* Advisory Opinion, nearly fifty years later in the *Nuclear Weapons* opinion, which both reaffirmed the existence of implied powers in principle but circumscribed their reach. The ICJ explained that “the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as ‘implied’ powers.”³⁴⁸ Such implied powers, the ICJ concluded, must be limited, however, to those “deemed a necessary implication of the Constitution of the Organization in the light of the purposes assigned to it by its member States.”³⁴⁹ Indeed, notwithstanding the *Reparation for Injuries* Court’s recognition that a “large measure of international personality and the capacity to operate upon an international plane” reposed in the UN, the *Nuclear Weapons* Court was at pains to emphasize that the Organs of the UN possess no “general” competence. Instead, international organizations’ powers (including their interpretive powers) are “governed by the ‘principle of speciality’, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.”³⁵⁰ To be sure, the *Reparation for Injuries* Court also cautioned that its recognition of international personality in the UN “is not the same thing as saying that it is a State ... or that its legal personality and rights and duties are the same as those of a State.”³⁵¹ The ICJ also noted that the UN did not, *ipso jure*, possess “the totality of rights and duties” enjoyed by States, but it nevertheless left the implied limits upon “necessarily implied” powers undefined.³⁵² In *Reparation for Injuries*, in considering the question of whether the UN had the capacity to bring a claim to

³⁴⁸ *Id.*, at § 25.

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Reparation for Injuries*, *supra* note 315, at 179.

³⁵² *See Id.* (“What [our holding] means is that [the United Nations] is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.”); *Id.*, at 184 (“Upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter.”).

obtain reparation for damage caused to its agent, the ICJ made the following general statement:

Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.³⁵³

The statement, approved by 11 Judges of the ICJ, provides for an extensive application of the notion of implied powers for the UN. Among the four dissenting opinions, Judge Hackworth's opinion stands out in challenging the broad notion of implied powers of the Organization. While he agreed that there was an implied power for the Organization to bring a claim for damage inflicted on itself, there was no such power for sponsoring such a claim with respect to an injury suffered by one of its employees. He said:

There can be no gainsaying the fact that the Organization is one of delegated and enumerated powers. It is to be presumed that such powers as the Member States desired to confer upon it are stated either in the Charter or in complementary agreements concluded by them. Powers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are "necessary" to the exercise of powers expressly granted.³⁵⁴

Judge Fitzmaurice also expressed his concern with the broad implied power expressed in *Reparation for Injuries* in his dissenting opinion in the 1971 *Namibia* Advisory Opinion:

This is acceptable if it is read as being related and confined to existing and specified duties; but it would be quite another matter, by a process of implication, to seek to bring about an extension of functions, such as would result for the Assembly if it were deemed (outside of Articles 4, 5, 6 and 17) to have a non-specified power, not only to discuss and recommend, but to take executive action, and to bind.³⁵⁵

If the *Reparation for Injuries* and *Nuclear Weapons* cases sketch the broad contours of international organizations' implied competences to engage in interpretation, the remaining guidance from the ICJ regarding *intra vires* interpretation by the Organs of the United Nations complicates,

³⁵³ *Reparation for Injuries*, *supra* note 315, at 182.

³⁵⁴ *Id.*, at 198.

³⁵⁵ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Dissenting Opinion of Judge Fitzmaurice, 1971 I.C.J. Rep. 208, 282 (Jun. 21).

rather than clarifies, the general principle of the implied power to interpret the constitutive instruments of the United Nations system.

In the *Certain Expenses* Advisory Opinion, the ICJ held that the General Assembly could finance as legitimate “expenses” the costs of deployment of peacekeeping forces to the Congo in pursuance of the Charter’s mandate of maintaining peace and security, even though the primary competence for maintaining peace and security is assigned by the Charter to the Security Council.³⁵⁶ Addressing, in part, the argument that expenses incurred by the Secretary-General in pursuing peace and security might violate the internal division of functions between the Organs of the UN, the ICJ held that even as applied to the very broad purpose of maintaining international peace and security, “when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the UN, the presumption is that such action is not *ultra vires* ...”³⁵⁷ Even if, the ICJ continued, the argument could be made that an action was taken “by the wrong organ,” that irregularity would be a matter whose effects were significant only on “the internal plane,” and “the body corporate or politic may [still] be bound ...”³⁵⁸ In a passage redolent of the decision of the San Francisco Conference to omit a provision in the Charter that would “place ultimate authority to interpret the Charter in the International Court of Justice,” the Court explained that in the absence of such a provision, “each organ must, in the first place at least, determine its own jurisdiction.”³⁵⁹ Accordingly, “[i]f the Security Council ... adopts a resolution *purportedly* for the maintenance of international peace and security and if, in accordance with ... such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute ‘expenses of the Organization.’”³⁶⁰

The *Certain Expenses* “presumption” has hardened into an oft-cited rule authorizing international organizations to engage in “self-interpretation” of their jurisdiction.³⁶¹ When considered in light of the non-binding character

³⁵⁶ *Certain Expenses of the United Nations*, *supra* note 72.

³⁵⁷ *Id.*, at 168.

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.* (emphasis added).

³⁶¹ *See, e.g.*, James R. Crawford, *Brownlie’s Principles of Public International Law* 184-85 (8th ed. 2012).

of the ICJ's advisory jurisdiction (absent special agreement³⁶²), the ICJ's jurisprudence defining the idea of an implied power generally, and the limits of *intra vires* interpretive powers specifically, remains somewhat elliptical. To take cases arising out of special agreements as an instructive contrast, the Court's ordinary advisory procedure will not "serv[e] . . . the object of an appeal," unless some special agreement "expressly invite[s] the Court] to pronounce, in its Opinion, which the agreement specifies will be 'binding', upon the validity of" an organ's decisions.³⁶³

B. Contentious Jurisdiction.

In two contentious cases the question of the effect of Security Council decisions under Chapter VII was brought and discussed by the parties before the Court. The issue has also been indirectly raised.

The *Lockerbie* decisions concern the aftermath of the destruction on December 21, 1988, of Pan Am flight 103 over Lockerbie, Scotland, killing 259 passengers and crew and 11 people on the ground. Investigations conducted by the United States and the United Kingdom concluded that two Libyan agents were responsible. Following their indictment, the United States and the United Kingdom demanded that Libya surrender them for trial, provide information and pay compensation.³⁶⁴ The Libyan government, claiming that its laws precluded extradition, denied the request and asked the United States and the United Kingdom to provide Libya with information to be used in domestic proceedings against the two accused Libyans. After Libya's refusal to extradite the accused, the Security Council adopted resolution 731 of January 21, 1992, in which it called upon Libya to surrender the accused nationals for trial.

In response, on 3 March 1992, Libya filed two separate applications instituting proceedings at the ICJ against the United States and the United Kingdom and applied for provisional measures to enjoin the two States

³⁶² See, e.g., Judgments of the Administrative Tribunal of the ILO Upon Complaints Made Against UNESCO, Advisory Opinion, 1956 I.C.J. Rep. 77 (October 23) (deciding a dispute referred to the Court pursuant to Article XII of the Statute of the Administrative Tribunal of the International Labor Organization, according to which any "opinion given by the Court shall be binding.").

³⁶³ *Id.*, at 84.

³⁶⁴ U.N. Doc. A/46/827-S/23308 contains requests made by the United Kingdom and the United States, in the form of a joint declaration, also reported in Report of the Secretary-General Submitted Pursuant to Paragraph 16 of Security Council Resolution 883 (1993) and Paragraph 8 of Resolution 1192 (1998), UN Doc. S/1999/726, § 16 (Jun. 30, 1999).

from taking any action against Libya calculated to coerce or to compel Libya to surrender the accused individuals to any jurisdiction outside of Libya.³⁶⁵ Libya claimed that the alleged acts fell within the meaning of Article 1 of the Montreal Convention (Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation signed in Montreal on 23 September 1971).

Three days after the close of the oral hearing, the Security Council adopted resolution 748, under Chapter VII, demanding that Libya extradite the accused individuals and imposing sanctions if Libya failed to comply.³⁶⁶

On 14 April 1992, the Court issued an Order on Libya's request, in which it found, by eleven votes to five, that the circumstances of the cases were not such as to require the exercise of its powers to indicate such measures under Article 41 of its Statute. In carefully formulated decisions, the Court also stated that it "cannot make definitive findings either of fact or law on the issues relating to the merits, and the right of the Parties to contest such issues at the stage of the merits must remain unaffected by the Court's decision".³⁶⁷ The Court, however, emphasized the obligations of the Parties under Articles 25 and 103 of the Charter:

to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that *prima facie* this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention.³⁶⁸

The Court also noted that it was not called upon, at that stage, to determine the legal effect of the Security Council resolution 748 (1992) adopted under Chapter VII, but an indication of a provisional measure, as requested by Libya, would impair the rights of the United States and the

³⁶⁵ Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order, 1992 I.C.J. Rep. 114 (Apr. 14); and Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident in Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order, 1992 I.C.J. Rep. 3 (Apr. 14) [hereinafter "ICJ, *Libya v. UK*"].

³⁶⁶ UNSC Res. 748.

³⁶⁷ ICJ, *Libya v. UK*, *supra* note 365, at § 38.

³⁶⁸ *Id.*, at § 39.

United Kingdom which they appeared *prima facie* to enjoy under that resolution.³⁶⁹

The Court's decision did not address the extent of the Security Council's discretion under the Charter to interpret its competence and whether the review of a Security Council resolution under Chapter VII was subject to the Court's jurisdiction. But those questions were addressed in some of the concurring and dissenting opinions.

In his separate opinion, Judge Shahabuddeen, while concurring, raised questions about the Security Council's interpretation of its competence:

The question now raised by Libya's challenge to the validity of resolution 748 (1992) is whether a decision of the Security Council may override the legal rights of States, and, if so, whether there are any limitations on the power of the Council to characterize a situation as one justifying the making of a decision entailing such consequences. Are there any limits to the Council's powers of appreciation? In the equilibrium of forces underpinning the structure of the United Nations within the evolving international order, is there any conceivable point beyond which a legal issue may properly arise as to the competence of the Security Council to produce such overriding results? If there are any limits, what are those limits and what body, if other than the Security Council, is competent to say what those limits are?³⁷⁰

He then concluded that "[i]f the answers to these delicate and complex questions are all in the negative, the position is potentially curious. It would not, on that account, be necessarily unsustainable in law; and how far the Court can enter the field is another matter. The issues are however important, even though they cannot be examined now."³⁷¹

Judge Lachs' separate opinion referred to respect for binding decisions of the Security Council as part of international law that the Court is obliged to apply:

While the Court has the vocation of applying international law as a universal law, operating both within and outside the United Nations, it is bound to respect, as part of that law, the binding decisions of the Security Council. This of course, in the present circumstances, raises

³⁶⁹ *Id.*, at §§ 40-41.

³⁷⁰ Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident in Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order, Separate Opinion by Judge Shahabuddeen, 1992 I.C.J. Rep. 28, 32 (Apr. 14).

³⁷¹ *Id.*

issues of concurrent jurisdiction as between the Court and a fellow main organ of the United Nations.³⁷²

In his dissenting opinion, Judge Bedjaoui while recognizing that the Court is not an appellate forum for Security Council resolutions, questioned how the Lockerbie bombing can “be seen *today* as an *urgent* threat to international peace when it took place *over three years ago*?”³⁷³ He also raised the question of whether “one organ can act in a way which renders the role of the other impossible.”³⁷⁴ Judge Bedjaoui agreed that the Council must act in accordance with the “principles of justice [as required by Article 1(1) of the Charter] ... - a relatively vague expression - just as [Council] should also draw inspiration from other principles of a political or other nature.”³⁷⁵

Judge Weeramantry stated in his dissenting opinion that the determination of the existence of any threat to the peace, breach of the peace or act of aggression is:

entirely within the discretion of the Council ... [and it] would appear that the Council and no other is the judge of the existence of the state of affairs which brings Chapter VII into operation. That decision is taken by the Security Council in its own judgment and in the exercise of the full discretion given to it by Article 39. Once taken, the door is opened to the various decisions the Council may make under that Chapter. Thus, any matter which is the subject of a valid Security Council decision under Chapter VII does not appear, *prima facie*, to be one with which the Court can properly deal.³⁷⁶

In the second phase of the case, a number of preliminary objections were raised by the United States and the United Kingdom, all of which were rejected by the Court. One concerned the effect of Chapter VII resolutions of the Security Council. The respondent States argued that those resolutions (748 (1992) and 883 (1993)) made Libya’s case moot, since they superseded any rights claimed by Libya including those under the Montreal Convention. The Court rejected this objection on two grounds: first, the relevant date for deciding admissibility was the date of

³⁷² Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order, Separate Opinion by Judge Lachs, 1992 I.C.J. Rep. 138, 138 (Apr. 14).

³⁷³ *Id.*, Dissenting Opinion by Judge Bedjaoui (translation), at § 21. [emphasis original].

³⁷⁴ *Id.*, at § 25.

³⁷⁵ *Id.*, at § 26.

³⁷⁶ *Id.*, Dissenting Opinion by Judge Weeramantry, at 176.

filing the application by Libya, and that Chapter VII resolutions of the Security Council were adopted after that date; second, that the objection by the respondent States on that point was a defence on the merits because the rights claimed by Libya under the Montreal Convention were incompatible with Libya's obligation under Charter Articles 25 and 103. For the Court, this objection was to the merits of the case and hence could not be decided as a preliminary issue.³⁷⁷ The Court, in effect, created a situation in which it would be in a position to pass judgment on the legal effect of Chapter VII Security Council resolutions. Two Judges dissented precisely on that issue.

President Schwebel, dissenting, stated that the Court is not "generally empowered" to exercise judicial review of the decisions of the Security Council "and it is particularly without power to overrule or undercut decisions of the Security Council made by it in pursuance of its authority under Articles 39, 41 and 42 of the Charter to determine the existence of any threat to the peace, breach of the peace, or act of aggression and to decide upon responsive measures to be taken to maintain or restore international peace and security."³⁷⁸ While recognizing that under the Charter "the Security Council is subject to the rule of law", President Schwebel supported an unfettered discretion of the Security Council in interpreting its jurisdiction:

[i]t does not follow from the facts that the decisions of the Security Council must be in accordance with the Charter and that the International Court of Justice is the principal judicial organ of the United Nations, that the Court is empowered to ensure that the Council's decisions do accord with the Charter. To hold that it does so follow is a monumental non sequitur, which overlooks the truth that, in many legal systems, national and international, the subjection of the acts of an organ to law by no means entails subjection of the legality of its actions to judicial review. In many cases, the system relies not upon judicial review but on self-censorship by the organ concerned or by its members or on review by another political organ.³⁷⁹

Similarly, *ad hoc* Judge Jennings (in the case where the UK was the respondent) stated that the exercise of discretionary power must comply with the applicable law:

³⁷⁷ Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, 1998 I.C.J. Rep. 115, §§ 44 & 50 (Feb. 27).

³⁷⁸ *Id.*, Dissenting opinion of President Schwebel, at 164-5.

³⁷⁹ *Id.*, at 167.

The first principle of the applicable law is this: that all discretionary powers of lawful decision-making are necessarily derived from the law, and are therefore governed and qualified by the law. This must be so if only because the sole authority of such decisions flows itself from the law. It is not logically possible to claim to represent the power and authority of the law and, at the same time, claim to be above the law.³⁸⁰

He then stated that the Court was obliged to take full account of Charter Articles 24, 25, 28, 39, 48 and 103, “declaring, interpreting, applying and protecting the law of the United Nations as laid down in no uncertain terms by the Charter.”³⁸¹ He saw the function of the Court, in a situation such as the one before it, to be to state the plain meaning and the intention of Charter Article 39 and the functions that are conferred on the Security Council by the Charter:

When, therefore, as in the present case, the Security Council, exercising the discretionary competence given to it by Article 39 of the Charter, has decided that there exists a "threat to the peace", it is not for the principal judicial organ of the United Nations to question that decision, much less to substitute a decision of its own, but to state the plain meaning and intention of Article 39, and to protect the Security Council's exercise of that body's power and duty conferred upon it by the law; and to protect the exercise of the discretion of the Security Council to “decide what measures not involving the use of armed force are to be employed to give effect to its decisions”.³⁸²

He then concluded that:

That there is no power of judicial review of Security Council decisions under Chapter VII of the Charter is not merely because of the dictum of the Court in the *Namibia* case. The position is established by the provisions of the Charter itself. Moreover it is evident from the records of San Francisco that a power of judicial review was proposed and rejected by the drafting conference. The Court is not a revising body, it may not substitute its own discretion for that of the Security Council; nor would it in my view be a suitable body for doing that; nor is the forensic adversarial system suited to the making of political decisions.³⁸³

³⁸⁰ Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, Dissenting opinion of Judge ad hoc Sir Robert Jennings, 1998 I.C.J. Rep. 99, 110 (Feb. 27).

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ *Id.*, at 111.

Judge Oda dissented on a different ground. In his opinion, Libya's application should be dismissed "on the sole ground that the dispute, if one exists, between the two States is not one that 'concern[s] the interpretation or application of the [Montreal] Convention'".³⁸⁴ He further stated that:

The question remains whether these Security Council resolutions, particularly resolutions, 748 (1992) and 883 (1993), which were adopted after the filing of the Application in this case, bear on the present case as brought by Libya. In other words, the question of whether Libya's 3 March 1992 Application has become without object after the adoption of these 31 March 1992 and 11 November 1993 Security Council resolutions is distinct from the case as presented by Libya. If there is any dispute in this respect, it could be a dispute between Libya and the Security Council or between Libya and the United Nations, or both, but not between Libya and the United Kingdom [or the United States].³⁸⁵

The issue of the effect of Security Council resolutions was also partly discussed by *ad hoc* Judge Lauterpacht in his separate opinion in *Bosnia v. Yugoslavia*.³⁸⁶ Bosnia claimed, *inter alia*, that the arms embargo imposed by Security Council resolution 713 and the subsequent resolutions did not apply to them, since they had to have the ability to obtain military weapons, equipment, and supplies from the other parties to the Genocide Convention to protect their people from genocide and for self-defense under Article 51 of the Charter. Judge Lauterpacht questioned the capacity of the Security Council to act "free of all legal controls". But he also recognized the limits on the judicial review of the Court in such cases:

This is not to say that the Security Council can act free of all legal controls but only that the Court's power of judicial review is limited. That the Court has some power of this kind can hardly be doubted, though there can be no less doubt that it does not embrace any right of the Court to substitute its discretion for that of the Security Council in determining the existence of a threat to the peace, a breach of the peace or an act of aggression, or the political steps to be taken following such a determination. But the Court, as the principal judicial organ of the United Nations, is entitled, indeed bound, to ensure the rule of law within the United Nations system and, in cases properly brought before

³⁸⁴ *Id.*, Dissenting Opinion of Judge Oda, at § 2.

³⁸⁵ *Id.*, at § 42.

³⁸⁶ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Provisional Measures, Order, 1993 I.C.J. Rep. 325 (Sep. 13).

it, to insist on adherence by all United Nations organs to the rules governing their operation.³⁸⁷

Judge Lauterpacht expressed the view that Charter Article 103 could not have intended to force compliance with a Chapter VII decision of the Security Council that breaches *jus cogens*:

The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and *jus cogens*. Indeed, one only has to state the opposite proposition thus - that a Security Council resolution may even require participation in genocide – for its unacceptability to be apparent.³⁸⁸

He also referred to Article 24(2) of the Charter requiring the Security Council to act in accordance with “the Purposes and Principles of the United Nations”. He noted that among those Purposes are “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion” as set out in Article 1(3) of the Charter.³⁸⁹ He did not contemplate that the Security Council would deliberately adopt a Chapter VII resolution in violation of *jus cogens*, but that it is possible that Council might inadvertently adopt a decision the consequence of which might lead to such an unforeseen result.³⁹⁰ In such circumstances, *pace* Judge Lauterpacht, Article 103 of the Charter might not apply and possibly such a resolution might become void. He did not suggest that the Court should declare such a resolution void, but that the attention of the Security Council should be drawn to this matter; the Court’s order should communicate the conflict with *jus cogens* norms to the Security Council, so that the Council would take it under advisement:

What legal consequences may flow from this analysis? One possibility is that, in strict logic, when the operation of paragraph 6 of Security Council resolution 713 (1991) began to make Members of the United Nations accessories to genocide, it ceased to be valid and binding in its operation against Bosnia-Herzegovina; and that Members of the United Nations then became free to disregard it. Even so, it would be difficult to say that they then became positively obliged to provide the Applicant with weapons and military equipment.

³⁸⁷ *Id.*, at § 99.

³⁸⁸ *Id.*, at § 100.

³⁸⁹ *Id.*, at § 101.

³⁹⁰ *Id.*, at § 102.

There is, however, another possibility that is, perhaps, more in accord with the realities of the situation. It must be recognized that the chain of hypotheses in the analysis just made involves some debatable links - elements of fact, such as that the arms embargo has led to the imbalance in the possession of arms by the two sides and that that imbalance has contributed in greater or lesser degree to genocidal activity such as ethnic cleansing; and elements of law, such as that genocide is *jus cogens* and that a resolution which becomes violative of *jus cogens* must then become void and legally ineffective. It is not necessary for the Court to take a position in this regard at this time. Instead, it would seem sufficient that the relevance here of *jus cogens* should be drawn to the attention of the Security Council, as it will be by the required communication to it of the Court's Order, so that the Security Council may give due weight to it in future reconsideration of the embargo.³⁹¹

In contentious cases, the Court has showed no enthusiasm for addressing the issue of judicial review of the decisions of the Security Council. In *Lockerbie*, in rejecting the UK and US preliminary objections based on a Chapter VII resolution of the Security Council, if the parties had not settled the case in 2003, the Court would have been required to ascertain the validity of a Chapter VII resolution. In *Bosnia v. Yugoslavia*, the Court avoided the issue altogether, on the ground that the application for provisional measures by placing the Court in a position of judicial review over a Chapter VII resolution, fell outside the scope of Article 41 of the Court's Statute.

The Court has not yet imposed any limitations upon the Security Council's interpretation of its powers under the Charter, specifically its interpretation of what constitutes a threat to international peace and security. It thus seems that there are no effective limitations upon the interpretative discretion of the Security Council. While some Judges suggested that the Security Council's jurisdiction and discretion are limited by the object and purpose of the Charter or *jus cogens* principles, seldom have Judges recognized the Court's jurisdiction to pronounce exactly what those limitations are. There appears to be a recognition on the part of the Court that such judicial pronouncements would require a judgment by the Court on the political dimensions of a matter or a dispute which is outside the scope of its competence. The Court's approach to judicial review of Security Council decisions cannot help but include the question of the Court's interpretation of its own jurisdictional competence under the Charter.

³⁹¹ *Id.*, at §§ 103 & 104.

VI. Interpretive Theories.

In light of the most prominent interpretive frameworks, an inquiry into international organizations' competence to engage in the dynamic interpretation of their organic statutes (and their peer organizations' organic statutes) presents the question of whether the instruments establishing those organizations are more analogous to treaties, to organic statutes – or to constitution such as statutes creating administrative agencies – that are familiar to domestic law. From its inception, the Charter of the UN has been referred to as both a “written constitution ... [and] a living instrument”.³⁹² And, indeed, a large swath of scholarship explores possible analogies between the problems encountered in interpreting the constitutive instruments of international organizations and the constitutions of States.³⁹³

In contrast to the Charter, the Vienna Convention on the Law of Treaties contains express provisions regulating the interpretive practice of tribunals called upon to construe and interpret treaties. Notwithstanding the debate regarding both the appropriateness and content of the rules of interpretation, the “treaty on treaties”³⁹⁴ imports a bounded dynamism into the rules of treaty interpretation, directing the interpreter to construe the text of a treaty with due regard to the treaty's object and purpose and to take both pre- and post-ratification developments into account. Although the VCLT accords primacy to the “ordinary meaning” of the text of the treaty, Article 31(3)(a)-(b) directs the interpreter to take both post-ratification agreements between the parties and the practice of the parties into account, “together with the context,” while Article 31(3)(c) directs the interpreter to “take[...] into account ... any relevant rules of international law applicable in the relations between the parties.”³⁹⁵ Similarly, Article 32 directs the interpreter to consider pre-ratification preparatory work “on the treaty and its circumstances of conclusion” in order to confirm that the “ordinary” meaning of the text should govern or

³⁹² Pollux, *The Interpretation of the Charter*, 23 BRIT. Y. INT'L L. 54 (1946).

³⁹³ See, e.g., JOSÉ E. ALVAREZ, *International Organizations as Law-makers*, Ch. 1 (2006) (describing, with some skepticism, the “domestic analogy” drawn between international organizations and state constitutions). JOSÉ E. ALVAREZ, *The Impact of International Organizations on International Law*, Ch. VI (2017).

³⁹⁴ See generally Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495 (1970).

³⁹⁵ See, e.g., *Kasikili/Sedudu Island Case (Botswana/Namibia)*, Judgment, 1999 I.C.J. Rep. 1045, 1101 (Dec. 13).

to resolve interpretive difficulties that make the ordinary meaning of the text ambiguous or “manifestly absurd or unreasonable.”

The two-tiered structure of the VCLT’s interpretive articles – elevating an inquiry into the “ordinary meaning” of the text above more “contextual” or “extrinsic” modes of interpretation – was not free from controversy when first proposed by the International Law Commission.³⁹⁶ In addition, Articles 31 and 32 of the VCLT are viewed, by some scholars, as open-ended, allowing a fair amount of discretion to the interpreter.³⁹⁷

The ICJ has frequently held that Article 31’s “General Rule” of treaty interpretation expresses customary international law.³⁹⁸ The ILC also considered that the Convention’s interpretive principles are viewed as “general rules of international law” rather than “merely technical rules” particular to a treaty.³⁹⁹ The ICJ, nevertheless, has also acknowledged that treaties creating international institutions raise “special” problems of interpretation that will often require assessment of an organization’s practice. Thus, in perhaps the most famous occasion on which the ICJ opined on the competence of an organization to interpret its own mandate,⁴⁰⁰ the ICJ structured its analysis of the competence of the World Health Organization in accordance with the “General Rule” of the VCLT.⁴⁰¹ After determining that “[i]nterpreted in accordance with their ordinary meaning, in their context and in the light of the object and

³⁹⁶ Myres McDougal, for example, proposed an amendment that would have removed the Convention’s “rigid” separation between “primary,” textual, means of interpretation and “supplementary” means of interpretation. Professor McDougal explained his delegation’s view that the separation between the textual and “supplementary” modes of interpretation rested on an “obscurest” tautology “since the determination of the question whether a text required, or did not require, interpretation was itself an interpretation.” See Official Records of the United Nations Conference on the Law of Treaties, First Session, 167, U.N. Doc. A/CONF.39/11 (1969).

³⁹⁷ See, e.g., José E. Alvarez, *The Impact of International Organizations on International Law* 381 (2017).

³⁹⁸ *Kasikili/Sedudu Island Case*, *supra* note 395, at § 18.

³⁹⁹ Mark E. Villiger, citing statement of Mr. A. Verdross in the Summary Records of the ILC concludes that “[t]he ILC texts on the rules of interpretation disclose that the ILC clearly acknowledged the legal quality of rules on interpretation.” See, Mark E. Villiger, *The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage?*, in *THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION* 105, 108 (Enzo Cannizzaro, ed., 2011). For Mr. A. Verdross’ statement see, Y.B. Int’l L. Comm’n, 1964, vol. I, at 21, § 15.

⁴⁰⁰ See generally Dapo Akande, *The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice*, 9 EUR. J. INT’L L. 437 (1998).

⁴⁰¹ ICJ, *Use of Nuclear Weapons*, *supra* note 322, at 76.

purpose of the WHO Constitution, as well as of the practice followed by the Organization, the provisions of its Article 2 may be read as authorizing the Organization to deal with [inter alia] the effects on health of the use of nuclear weapons ...”,⁴⁰² the ICJ held that the same provisions could *not* be “interpreted in accordance with the criteria referred to above, ... as conferring upon the Organization a competence to address the legality of the use of nuclear weapons.”⁴⁰³ The ICJ’s analysis was discussed more fully above.

That said, the final text of Article 31 is notably silent on the “dynamic,” or temporal aspect of interpretation, as the International Law Commission “thought that the correct application of the temporal element would normally be indicated by... interpretation in good faith.”⁴⁰⁴ But, as Oliver Dorr has explained in his commentary on the VCLT, there are at least two rival theories about what good faith interpretation requires in this context. The first “static,” the other “dynamic.” The former is relatively uncontroversial: terms contained in a written agreement should be interpreted in light of their contemporaneous meaning at the time the agreement was signed. The latter is, however, frequently invoked by courts and scholars who seek a more “evolutionary” approach which “seeks to establish the meaning of a treaty at the time of its interpretation.”⁴⁰⁵ In its most robust formulation, the “dynamic” approach “takes into account the social context and may even necessitate reformulation of the original object and purpose [of a treaty].”⁴⁰⁶

According to the static approach to interpretation, the interpreter of a written agreement is to construe the terms of the agreement in accordance with the meaning of those terms at the time the agreement was formed. Thus, in the *Navigational and Related Rights* case, the ICJ interpreted the phrase “objects of commerce” contained in an 1858 treaty in accordance with indicators of that phrase’s meaning near the time in which the treaty was concluded.⁴⁰⁷ The ICJ found it probative that the parties translated the phrase to mean “purposes of commerce” when they submitted their

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ Oliver Dorr & Kirsten Schmalenbach, Vienna Convention on the Law of Treaties: A Commentary 528 (2012).

⁴⁰⁵ *Id.*, at 533.

⁴⁰⁶ Catherine Brolman, *Specialized Rules of Treaty Interpretation*, in THE OXFORD GUIDE TO TREATIES 512 (Dunan Hollis ed., 2012).

⁴⁰⁷ Dispute Regarding Navigational and Related Rights (Costa Rica-Nicar.), Judgment, 2009 I.C.J. Rep. 213 (July 13) [hereinafter “ICJ, *Navigational and Related Rights*”].

dispute to arbitration in 1887. While the intertemporal indicator was not dispositive, the ICJ held that “this concurrence, occurring relatively soon after the Treaty was concluded, is a significant indication that at the time both Parties understood ‘con objetos de comercio’ to mean ‘for the purposes of commerce’.”⁴⁰⁸ The static approach, the ICJ continued, assures that the interpreter finds the “parties’ common intention.”⁴⁰⁹ This solicitude for the parties’ original understanding pervades the ICJ’s treaty interpretation jurisprudence, especially in cases involving title to territory and boundary disputes.⁴¹⁰

But static interpretation is not without limit. Even the *Navigational and Related Rights* Court cautioned that Article 31(3)(b) of the VCLT expressly contemplates the subsequent practice of the parties, and further explained that “there are situations in which the parties’ intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used – or some of them – a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for ... developments in international law.”⁴¹¹

The upshot of the ICJ’s approach to static interpretation is that while, as a general matter, terms are to be interpreted in static fashion, where those terms themselves bespeak the intent to allow the meaning of a term to change over time, these general terms should evolve – that is, they should be updated to import modern usages.

The *Navigational and Related Rights* Court illustrated this “two-tiered”⁴¹² approach to static versus dynamic interpretation by invoking its prior decision in *Aegean Sea Continental Shelf*.⁴¹³ In that case, the ICJ was “called upon to interpret a State’s reservation to a treaty excluding from the Court’s jurisdiction ‘disputes relating to territorial status’ of that State, where the meaning of ‘territorial status’ was contested.”⁴¹⁴ Because

⁴⁰⁸ *Id.*, at 240.

⁴⁰⁹ *Id.*, at 242.

⁴¹⁰ See generally Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951–54: General Principles*, 30 BRIT. Y.B. INT’L L. 1, 5–7 (1953) (“It can now be regarded as an established principle of international law that in such cases the situation in question must be appraised, and the treaty interpreted, in the light of the rules of international law as they existed at the time, and not as they exist today.” *Id.*, at 5).

⁴¹¹ ICJ, *Navigational and Related Rights*, *supra* note 407, at 242.

⁴¹² DÖRR & SCHMALENBACH, *supra* note 404, at 535.

⁴¹³ ICJ, *Navigational and Related Rights*, *supra* note 407, at 241 (citing *Aegean Sea Continental Shelf* (Greece v. Turkey), 1978 I.C.J. Rep. 3 (Dec. 19) [hereinafter “ICJ, *Aegean Sea*”]).

⁴¹⁴ *Id.*, at 242–243.

“territorial status” was a “generic term,” the ICJ found that good faith interpretation required a dynamic assessment of subsequent developments in international law. As the *Aegean Sea* court explained,

Once it is established that the expression ‘the territorial status of Greece’ was used ... as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time. This presumption ... is even more compelling when it is recalled that the ... convention for the pacific settlement of disputes [was] designed to be of the most general kind and of continuing duration ...⁴¹⁵

On the basis of this general account, one may say once static interpretation is taken to be the general principle, “dynamic” or “evolutionary” interpretation is appropriate only if that term “is meant by the parties to be interpreted in a dynamic manner” or if the term embodies a “concept ... that is, from the outset, evolutionary.” Only then should the interpreter give the term in question “the meaning it possesses at the time of interpretation, considering the development of linguistic usage, international law and other relevant circumstances in that moment.”⁴¹⁶

To be sure, some accounts of treaty interpretation do not subordinate “dynamic” interpretation to so-called “static” interpretation. Indeed, the ICJ itself took account of the *evolutionary* character of treaties with constitutional character in its Advisory Opinion *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970)*:

Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant - “the strenuous conditions of the modern world” and “the well-being and development” of the peoples concerned - were not static, but were by definition evolutionary, as also, therefore, was the concept of the “sacred trust”. The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter

⁴¹⁵ *Id.*, at 243 (quoting ICJ, *Aegean Sea*, *supra* note 413, at 32).

⁴¹⁶ DÖRR & SCHMALENBACH, *supra* note 404, at 535.

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of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.⁴¹⁷

The Appellate Body of the World Trade Organization, in the Shrimp/Turtle dispute, was more explicit in its reliance on and reasoning for the *evolutionary* interpretation with regard to the meaning of “exhaustible natural resources” in Article XX(g) of GATT:

129. The words of Article XX(g), “exhaustible natural resources”, were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the *WTO Agreement* shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the *WTO Agreement* -- which informs not only the GATT 1994, but also the other covered agreements -- explicitly acknowledges “the objective of *sustainable development*”. ...

130. From the perspective embodied in the preamble of the *WTO Agreement*, we note that the generic term “natural resources” in Article XX(g) is not “static” in its content or reference but is rather “by definition, evolutionary”. It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources ...

131. Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the *WTO Agreement*, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources...⁴¹⁸

The Tribunal in the Arbitration regarding the Iron Rhine (“IJzeren Rijn”) Railway between the Kingdom of Belgium and the Kingdom of

⁴¹⁷ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, § 53.

⁴¹⁸ United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 12 October 1998 (footnote omitted).

the Netherlands,⁴¹⁹ referring to the problem of “intertemporality” in the interpretation of treaties took account of, European law, general international law, international environmental law, including its emerging principles in interpreting certain phrases in Article XII of the 1839 Treaty of Separation between the Netherlands and Belgium. The Parties in the Arbitration Agreement requested the Tribunal “to render its decision on the basis of international law, including European law if necessary, while taking into account the Parties’ obligations under article 292 of the EC Treaty.” The parties in their written submissions argued EC Treaty including the European Commission’s Habitat and Bird Directives. They also argued the United Nations Framework Convention on Climate Change and its Tokyo Protocol, and the TENS Trans-European Network fostered by the United Nations Economic Commission for Europe. Indeed the Tribunal noted that neither Party denied the relevance of environmental norms with regard to the questions they posed to the Tribunal.⁴²⁰ The Tribunal did not only rely on the request of the parties with regard to the relevant applicant law, but also relied on Article 31(3)(c) of the VCLT:

58. It is to be recalled that Article 31, paragraph 3, subparagraph (c) of the Vienna Convention on the Law of Treaties makes reference to “any relevant rules of international law applicable in the relations between the parties”. For this reason – as well as for reasons relating to its own jurisdiction – the Tribunal has examined any provisions of *European law* that might be considered of possible relevance in this case (see Chapter III below). Provisions of *general international law* are also applicable to the relations between the Parties, and thus should be taken into account in interpreting Article XII of the 1839 Treaty of Separation and Article IV of the Iron Rhine Treaty. Further, *international environmental law* has relevance to the relations between the Parties. There is considerable debate as to what, within the field of environmental law, constitutes “rules” or “principles”; what is “soft law”; and which environmental treaty law or principles have contributed to the development of customary international law. Without entering further into those controversies, the Tribunal notes that in all of these categories “environment” is broadly referred to as including air, water, land, flora and fauna, natural ecosystems and sites, human health and safety, and climate. *The emerging principles*, whatever their current

⁴¹⁹ Award in the Arbitration regarding the Iron Rhine (“IJzeren Rijn”) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, Decision, XXVII R.I.A.A. Rep. 35 (May 24, 2005).

⁴²⁰ *See Id.*, at § 60.

status, make reference to conservation, management, notions of prevention and of sustainable development, and protection for future generations.

59. Since the Stockholm Conference on the Environment in 1972 there has been a marked development of international law relating to the protection of the environment. Today, both international and EC law require the integration of appropriate environmental measures in the design and implementation of economic development activities. Principle 4 of the Rio Declaration on Environment and Development, adopted in 1992 (31 I.L.M. p. 874, at p. 877), which reflects this trend, provides that “environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it”. Importantly, these emerging principles now integrate environmental protection into the development process. Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm (see paragraph 222). This duty, in the opinion of the Tribunal, has now become a principle of general international law. This principle applies not only in autonomous activities but also in activities undertaken in implementation of specific treaties between the Parties. The Tribunal would recall the observation of the International Court of Justice in the *Gabčíkovo-Nagymaros* case that “[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development” (*Gabčíkovo-Nagymaros (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, at p. 78, para. 140). And in that context the Court further clarified that “new norms have to be taken into consideration, and ... new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past” (*Ibid.*).

In the view of the Tribunal this dictum applies equally to the Iron Rhine railway.⁴²¹

According to the purer “dynamic” or “evolutionary” approach, whatever the method, “it cannot be denied that there is a certain dynamism that is relevant in treaty interpretation,” and the question is merely one of extent.⁴²² Dynamic interpretation merely recognizes that “[a]n evolutive interpretation is an interpretation where a term is given a

⁴²¹ *Id.*, at §§ 58-59.

⁴²² See Rudolf Bernhardt, *Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights*, 42 GERMAN Y.B. INT’L L. 11, 16 (1999).

meaning that changes over time.”⁴²³ And indeed, certain tribunals have taken the status of “quasi-constitutional” instruments like the European Convention on Human Rights to authorize ongoing dynamic interpretation in all cases. This is because, as the European Court of Human Rights held, the Convention is “a living instrument which ... must be interpreted in light of present-day conditions.”⁴²⁴

VII. Conclusions

International organizations are established by multilateral treaties, endowed with a separate and distinct legal personality from their member States and assigned certain goals and functions. As multilateral treaties, constituent instruments of international organizations have amendment provisions, but they often are cumbersome and contain significant procedural limitations on the adoption and coming into force of amendments. Nor are they good candidates for modification by subsequent agreements or their replacement by an altogether new treaty. These instruments are in principle drafted in general terms allowing ample scope for interpretation and adaptation to changing circumstances, hence they are in a continuous process of interpretation, some of which amounts to *de facto* or informal modifications.

There has been a deliberate decision by the drafters of the constituent instruments of international organizations to allow them to interpret their own constituent instruments. After canvassing a number of *ad hoc* alternatives that States might use to resolve interpretive differences at the San Francisco Conference, references with respect to authoritative interpretation were deliberately left out of the UN Charter. In the case of the United Nations, and some Specialized Agencies, there has also been a deliberate decision not to vest any organ of these international organizations with the exclusive competence to interpret authoritatively the system’s constitutive instruments. Hence international organizations

⁴²³ Sondre Torp Helmersen, *Evolutionary Treaty Interpretation: Legality, Semantics and Distinctions*, 6 EUR. J. LEGAL STUD. 161, 162 (2013).

⁴²⁴ *Tyrer v. United Kingdom*, App. No. 5856/72, Judgment, § 31 (Apr. 25, 1978). See generally Dupuy, *Evolutionary Interpretation of Treaties*, *supra* note 318, at 135 (describing the “leitmotif” of dynamic interpretation in the European Court of Human Rights); ALEXANDER GRABERT, *Dynamic Interpretation in International Criminal Law* 15–20 (2015) (collecting examples of “dynamic interpretation in the law of treaties” in the *human rights and international criminal law contexts*); but see EIRIK BJORGE, *The Evolutionary Interpretation of Treaties* (2014) (arguing for “one coherent method of treaty interpretation,” in which the ordinary tools of Articles 31–33 of the VCLT are brought to bear, and “evolutionary interpretation” arises only where the parties “so intended.”).

interpret their constituent instruments in their daily work, in the light of an endless stream of novel legal and factual issues.

The competence to interpret authoritatively their own constitutive instruments has permitted a broad and permissive jurisprudence of “constitutional” interpretation to flourish within each organization, subject only to infrequent – and merely advisory – oversight. Moreover, that oversight can take place only with the consent and at the request of the international organization concerned. This has had the effect of providing flexibility for Member States when there is a general agreement to interpret their constituent instruments extensively without the delay which is inherent in formal amendment procedures. One further noticeable effect of international organizations’ interpretative competence of their constituent instruments is the absence of the requirement of unanimity. Some Member States of an international organization may not agree to a particular interpretation but their disagreement will not undermine the authoritative character of the interpretation. An interpretation that is *generally accepted* by members of an international organization is authoritative.

As was anticipated at the San Francisco Conference, from its inception the Charter has been interpreted by the General Assembly and Security Council. The ostensible legal justifications for these interpretations were the meaning of the terms, the *travaux* of the Charter and its object and purpose. But what mattered for a particular interpretation to succeed was consensus or the consent of the majority of the Member States including a large portion of the Permanent Members of the Security Council.

Specialized Agencies have different mechanisms for review of internal interpretations of their constituent instruments but they operate only in case of a dispute. Where there is consensus among Member States of the Specialized Agencies on a particular interpretation of a provision of their constituent instruments, there is no review process. Theoretically, if there is no objection from Member States, there are no limits on the discretionary power of the Specialized Agencies to dynamically interpret their constituent instruments.

The practice of the various Organs of the UN and the Specialized Agencies also became a source of reliance for further interpretations. Even the earlier interpretation-advice provided by the Secretariat of the UN seems to have followed this pattern of assigning importance to the past practice of the organization to which States members of the organizations have consented.

What appears in retrospect as an inexorable march of interpretation by international organizations of their constitutive instruments has suggested

to several scholars that the organizations' interpretation of their constitutive instruments is "unique" and, as such, "warrant[s] a separate interpretative framework" beyond the VCLT.⁴²⁵ Because certain treaties are "constitutive" or "constitutional," their argument runs, they create "a semi-independent or 'internal' legal order based on specific institutional rules."⁴²⁶ This theory has a long pedigree in the law of treaties. Lord McNair, for example, identified treaties "creating constitutional international law" as "a kind of public law transcending in kind and not merely in degree the ordinary agreements between states."⁴²⁷

While the drafters of the VCLT intended to codify interpretive rules that would apply to all treaties, they were conscious of the special character of treaties that were constituent instruments of international organizations. The drafters did not suggest any modification of the general law as proposed in the Articles but, instead, recognition of a *lex specialis* applicable to constituent instruments of international organizations composed of any relevant rules and the established practice of the organization concerned. Article 5 of the 1969 and 1986 Vienna Conventions recognizes the special status of treaties which are constituent instruments of international organizations and is sufficiently flexible to address any future application of the Conventions to their constituent instruments. But that flexibility contains no tangible outer limits. In fact, since the rules of interpretation are subject to the rules of the organizations and the established practice of the organizations, which themselves could evolve through interpretation and more practice, the process of interpretation becomes a circular process, in which there can be *a priori* no limitation to the evolution of the interpretation performed by the organizations.⁴²⁸ In practice the limits are to be found in the world political process.

⁴²⁵ Brolman, *supra* note 406, at 508.

⁴²⁶ *Id.*, at 510.

⁴²⁷ Arnold D. McNair, *The Functions and Different Legal Character of Treaties*, 11 BRIT. Y.B. OF INT'L L. 100, 112 (1930).

⁴²⁸ In 2018, the ILC completed a set of conclusions on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". Report of the International Law Commission, Seventieth Session (30 April–1 June and 2 July–10 August 2018), supplement No. 10 (A/73/10), Chapter IV. Conclusion 12 of the work of the ILC addresses the question of "Constituent instruments of international organizations". It reads:

"1. Articles 31 and 32 apply to a treaty which is the constituent instrument of an international organization. Accordingly, subsequent agreements and subsequent practice

With the notable exception of the ICJ's occasional policing of the "principle of speciality," only once has the statement that the ICJ should perform a *de novo* inquiry "with regard to the[] legality, validity and effect" of organizations' interpretations appeared in its dissenting opinions.⁴²⁹ Accordingly, "it remains doubtful whether and how far 'other actors' can challenge *ultra vires* decisions" by an Organ of the UN⁴³⁰ or of a Specialized Agency.

The ambiguity in the ICJ's confirmation of implied powers is perhaps an entailment of the decision at San Francisco to leave the Charter system without an authoritative interpreter. Where, as in the Charter system, "there are no clear indications of the organ which may interpret an instrument or set of principles or rules, in practice it often becomes necessary to accept the fact that various organs of an international organization will interpret them, and that in most cases such interpretations will be generally accepted."⁴³¹

The ICJ's description of the "special attention" due to an organization's objectives, effectiveness, and its "own practice"⁴³² suggests "specialized rules", more teleological than textual and attaching "particular importance" to the "practice of an organization."⁴³³ And indeed, taken as a whole, the ICJ's approach to constitutive treaties has sowed some doubt as to the exhaustiveness of the VCLT's approach in these exercises.

under article 31, paragraph 3, are, and subsequent practice under article 32 may be, means of interpretation for such treaties.

2. Subsequent agreements and subsequent practice of the parties under article 31, paragraph 3, or subsequent practice under article 32, may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument.

3. Practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31 and 32.

4. Paragraphs 1 to 3 apply to the interpretation of any treaty which is the constituent instrument of an international organization without prejudice to any relevant rules of the organization."

While this Conclusion recognizes the relevance of the VCLT Articles 31 and 32 to the interpretation of the constituent instruments of international organizations, it maintains the deference granted to "rules of organization".

⁴²⁹ See Rudolf Bernhardt, *Ultra Vires Activities of International Organizations*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI* 599 (quoting Case Concerning East Timor, dissenting opinion of J. Skubiszewski, 1995 I.C.J. Rep. 90, 224 (Jun. 30)).

⁴³⁰ See *Id.*, at 604.

⁴³¹ Sohn, *supra* note 26, at 169.

⁴³² ICJ, *Use of Nuclear Weapons*, *supra* note 322, at 75.

⁴³³ Brolman, *supra* note 406, at 512.

Shabtai Rosenne, for example, saw in the ICJ's interpretations of its own constituent instruments "little doubt that adherence to 'traditional' legal concepts of the law of treaties is not a prominent feature of the interpretation ... although it is not displaced entirely."⁴³⁴

In interpreting the Charter, international organizations have invoked and relied upon other international conventions. The General Assembly relied on its own Universal Declaration of Human Rights in interpreting and elaborating the concept and content of the principle of self-determination in Article 1(2) of the Charter and, in this regard, in determining the United Nations' responsibility under Charter Articles 55, 73 and 76. Similarly, the Security Council has relied on the obligation to protect civilians in expanding the scope of "threat to the peace, breach of the peace, or act of aggression" in Article 39, and the measures it is authorized to take under Charter Article 41. Human rights issues, connected with the delisting procedures in the targeted sanctions, pressed the Secretary-General, the High Commissioner for Human Rights and several States on the Security Council to adopt further resolutions to address the human rights shortcomings in resolution 1267 of 1999. In the context of the World Bank, considerations of human rights and the protection of the environment as well as good governance and anti-corruption were used in the interpretation of the World Bank's Articles of Agreement. Hence, international organizations have used some international conventions when they are consistent with the policies they wish to promote or the measures they wish to take.

The analysis presented in this Report demonstrates that although certain interpretations of constituent instruments by international organizations amount to *de facto* amendment of their constituent instruments, the level of oversight or limitation upon such interpretations is practically nonexistent or ineffective. Moreover, even when such regulation does exist, as in the case of the VCLT, the regulation is (a) very soft and lacking in obligatory character (the subjection to the rules, even customary rules of the organization) and (b) is unenforceable due to the lack of effective review (the advisory character and limited scope of the ICJ's mandate, subject to the internal decision-making process of the institutions concerned).

The VCLT was only adopted in 1969, so it should not be surprising that specific reliance on the rules of interpretation stipulated in that treaty is absent from the prior interpretive practice of international organizations.

⁴³⁴ Shabtai Rosenne, *Developments in the Law of Treaties* 195 (1989) (cited in *Id.*, at 514 n.39).

By the time the VCLT was adopted, the UN and a number of other international organizations had already built up a significant body of interpretative practice, all of which relied on the consent of State Members of these organizations. But even following the adoption of the VCLT, the language of Articles 31 and 32 does not appear to have limited the scope of international organizations' interpretations.

The practice of the Secretariat has acknowledged the necessity for evolutionary, gap-filling interpretation. For example, in 1982 the Secretariat's Legal Counsel summarized the evolution of legal personality and functional immunity for permanent observer missions at the UN. The Secretariat's opinion explained that the institution of permanent observer missions arose as a matter of practice starting in 1946, even though "the Charter ... makes no provision for observers of non-member states."⁴³⁵ Because, the Secretariat explained, "the institution of permanent observer missions is one which has developed essentially through practice," the "privileges and immunities of such missions has evolved gradually."⁴³⁶ As the number and mandates of permanent observer missions increased, the Secretariat eventually "elaborate[d] further on the legal status of such missions, resulting in the conclusion that permanent observer missions were entitled to functional privileges and immunities."⁴³⁷ The Secretariat emphasized that Article 105 of the Charter, as part of a "constituent instrument," did not "of course, spell out these privileges and immunities but left it to the General Assembly ..." And even in the absence of action by the General Assembly, "the principle is clear and ... it flows by necessary intendment from Article 105 that regardless of the detailed application ... by the General Assembly, certain minimum privileges and immunities are inherent to the Organization and its members ... Such functional privileges and immunities clearly extend to the institution of permanent observer missions ..."⁴³⁸

The broad scope of interpretive practice of international organizations has also been compelled by the general language of many of the provisions of their constituent instruments. Permissive language allowed the organizations to fill organizational gaps, to fulfil the intentions of their drafters, and to remain relevant to the challenges they confront. But

⁴³⁵ 1982 U.N. Jurid. Y.B., *supra* note 194, at 205.

⁴³⁶ *Id.*

⁴³⁷ *See Id.*, at 206.

⁴³⁸ *See Id.*, at 207.

international organizations have been cautious in interpreting provisions which specifically limit their competence. For example, curtailing membership rights or expulsion or suspension of membership can only be done by way of amendment under Article 108 of the Charter.

The Charter itself, provides the parameters within which the UN may operate, hence establishing what might be referred to as the framework of its interpretive scope. Articles 1 and 2 of the Charter, on purposes and principles, are generally viewed as regulating the interpretive competence of the organs of the UN. Statements by some of the original organizers and drafters of the Charter, in the *travaux* of the San Francisco Conference (covered in the earlier part of this Report) indicate that the reason for reiterating the content of some of these two Preambular provisions in the body of the Charter was as a way of laying down the boundaries of the authority of the Security Council. In particular, paragraph 1 of Article 1 requiring that the maintenance of international peace and security should be in conformity with “the principles of justice and international law” has been viewed as governing the interpretive competence of the Security Council. Thus, international conventions as well as the practice of the organizations have also been relied on.

The capacity of international organizations to interpret their own constituent instruments without oversight extends to their capacity to determine the limit of that competence. This is similar to the principle of *compétence de la compétence* of international tribunals.

One other factor appears to have motivated the drafters of the Charter and, by analogy, the constituent instruments of Specialized Agencies. It is that international organizations can only function if there is general agreement among the members of these organizations on their direction and operation. International organizations are established on the basis of what Goodrich and Hambro referred to as “the principle of voluntary cooperation between states in the promotion of common objectives.”⁴³⁹ It is presumed that if international organizations fail to interpret their constituent instruments consistent with international law and justice, that would lead to their dissolution.⁴⁴⁰ Paradoxically, outside oversight of

⁴³⁹ Leland M. Goodrich & Edvard Hambro, *supra* note 182, at 21. Although Goodrich and Hambro made this statement with regard to the Charter of the UN, their point is generally applicable to other international organizations.

⁴⁴⁰ At the Francisco Conference, during the discussion on the right to withdraw from the Charter, it became clear that the majority of the participating States agreed that there should be such a right. There was, however, debate as to whether there should be an explicit provision in the Charter on the right to withdraw or whether that understanding

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their interpretation of their constituent instruments without the consent of the membership could be counterproductive to the point that it might lead to dysfunction and even dissolution. The essential requirement of cooperation embedded in the structure and manner in which they operate provides an internal control which addresses their interpretative needs. Outside oversight through solicitation of advisory opinions, an option for many of these organizations, requires the consent of their Member States.

should be left to the agreed interpretation of the San Francisco Conference. It was eventually agreed not to include an explicit provision in the Charter, but to adopt a declaration of interpretation which was incorporated in the Report of Committee I/2 and was eventually approved by Commission I and the Plenary of the Conference. The Declaration while it discourages withdrawal from membership of the Organization, it does not prohibit it. There is a paragraph in the Declaration which implies that failure of the Organization to comply with law and justice would lead to its dissolution:

It is obvious, however, that withdrawal or some other forms of dissolution of the Organization would become inevitable if, deceiving the hopes of humanity, the Organization was revealed to be unable to maintain peace or could do so only at the expense of law and justice. U.N.C.I.O., Vol. VII, *supra* note 182.

DRAFT RESOLUTION

The Institute of International Law,

Whereas international organizations are established by multilateral agreements or by decisions of other international organizations,

Whereas amendment procedures for the modification of constituent instruments of international organizations may be cumbersome and inefficient, and *whereas* the drafters of these instruments deliberately decided to allow the international organizations to interpret their own constituent instruments and to limit outside oversight over such interpretation exercises,

Appreciating that international organizations operate in changing environments and may sometimes have to adjust quickly to new challenges in order to remain relevant and discharge their assigned functions, and *appreciating* that international organizations may interpret their constituent instruments dynamically to meet current challenges and to fill gaps,

Having considered the Report of the Seventh Commission;⁴⁴¹

1. *Affirms* that the dynamic interpretation by international organizations of their constituent instruments should be consistent with the principles and purposes of those instruments and with their evolving objects and purposes;
2. *Further affirms* that the dynamic interpretation by international organizations of their constituent instruments should take account of the core principles of international law, many of which have been initiated and promoted by these organizations themselves;
3. *Is of the opinion* that since no international organization is an island unto itself, but is a part of an ensemble of institutions sharing a broad common interest in world order, international organizations, in exercising their competence to interpret their constituent instruments, should pay due regard to the objects and purposes of other international organizations;
4. *Believes* that when there is a general agreement among the membership of the international organization as to an interpretation, the interpretation should be deemed to be *intra vires* and lawful;

⁴⁴¹ “Are there Limits to the Dynamic Interpretation of the Constitution and Statutes of International Organizations by the Internal Organs of such Organizations (with Particular Reference to the UN System)?”

5. *Emphasizes* that interpretation by international organizations of their constituent instruments may not violate *jus cogens*;
6. *Further Emphasizes* that interpretations by International organizations of their constituent instruments may not violate internationally protected fundamental human rights.

PROJET DE RESOLUTION (traduction)

L'Institut de Droit international,

Considérant que les organisations internationales sont établies par accord multilatéral ou par décision d'autres organisations internationales,

Considérant que les procédures d'amendement visant à la modification des actes constitutifs des organisations internationales peut s'avérer encombrant et inefficace, et *considérant* que les rédacteurs et rédactrices de ces actes ont fait le choix délibéré d'autoriser les organisations internationales à interpréter leurs propres actes constitutifs et de limiter le contrôle externe de ces interprétations,

Reconnaissant que les organisations internationales évoluent dans des contextes changeants et doivent parfois s'adapter rapidement à de nouveaux défis afin de rester pertinentes et de remplir les fonctions qui leur sont confiées, et *reconnaissant* que les organisations internationales peuvent interpréter leurs actes constitutifs de manière dynamique en vue de relever les défis actuels et de combler les lacunes,

Ayant examiné le Rapport de la 7^{ème} Commission ;⁴⁴²

1. *Affirme* que l'interprétation dynamique par les organisations internationales de leur actes constitutifs devrait être conforme aux principes et buts desdits actes ainsi qu'à leurs objets et buts évolutifs ;
2. *Affirme en outre* que l'interprétation dynamique par les organisations internationales de leurs actes constitutifs devrait être conforme aux principes fondamentaux du droit international, lesquels, pour bon nombre d'entre eux, ont été instaurés et promus par ces mêmes organisations ;
3. *Est d'avis* que, dans la mesure où, loin d'être insulaire ou autosuffisante, toute organisation internationale s'inscrit dans un ensemble d'institutions ayant un intérêt commun pour l'ordre mondial,

⁴⁴² "Are there Limits to the Dynamic Interpretation of the Constitution and Statutes of International Organizations by the Internal Organs of such Organizations (with Particular Reference to the UN System)?"

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les organisations internationales devraient tenir dûment compte des objets et buts des autres organisations lors de l'exercice de leur compétence en matière d'interprétation de leurs actes constitutifs ;

4. *Estime* que lorsqu'il existe un consensus général au sein des membres de l'organisation internationale au sujet d'une interprétation, cette interprétation devrait être considérée comme *intra vires* et légitime ;
5. *Souligne* que l'interprétation par les organisations internationales de leurs actes constitutifs ne sauraient enfreindre les normes de *jus cogens* ;
6. *Souligne en outre* que les interprétations par les organisations internationales de leurs actes constitutifs ne sauraient enfreindre les droits humains protégés au niveau international.

